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In The

Supreme Court of the United States

SEA HAWK SEAFOODS, INC.,

Petitioner,

v.

EXXON MOBIL CORPORATION AND
EXXON SHIPPING COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The doctrine of judicial estoppel safeguards the integrity and efficacy of the judicial process by preventing a litigant from changing positions in the midst of litigation. The questions presented are:

(1) Does application of judicial estoppel require a showing that a litigant's previous inconsistent position was adopted or accepted by the court in which it was advanced?

(2) Does application of judicial estoppel require a showing that a court was misled by the litigant's prior position?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Sea Hawk Seafoods, Inc. represents that there is no parent corporation or any publicly held corporation that owns 10% or more of Sea Hawk Seafoods, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sea Hawk Seafoods, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's unpublished order denying Sea Hawk's motion for entry of amended final judgment and its amended final judgment regarding Sea Hawk's claims are reproduced in the appendix ("Pet. App.") at 4-26. The Ninth Circuit's unpublished decision affirming the district court's order and final judgment and its order denying Sea Hawk's petition for panel rehearing are reproduced at Pet. App. 1-3, 47.

JURISDICTION

The Ninth Circuit filed its decision on December 19, 2008 and denied Sea Hawk's timely petition for panel rehearing on March 25, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Sea Hawk is one of many seafood processors whose business was devastated when Exxon put a

relapsed alcoholic in charge of a supertanker. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2612 (2008) ("*Baker*"). As a result, on March 24, 1989, "the tanker ran aground on Bligh Reef, tearing the hull open and spilling 11 million gallons of crude oil into Prince William Sound." *Id.* at 2612-13. Because that spill occurred in the pristine waters near Sea Hawk's plant, Sea Hawk immediately filed a class action lawsuit against Exxon. *In re Exxon Valdez (Sea Hawk Seafoods, Inc. v. Exxon Corp.)*, 484 F.3d 1098, 1100 (9th Cir. 2007) ("*Sea Hawk Seafoods*"). Exxon subsequently removed the lawsuit to federal court. *Id.*

After more than a decade of litigation, including numerous appeals and attempts to negotiate and compromise, Sea Hawk ultimately agreed to settle its compensatory damages claim against Exxon for $2,147,000 plus prejudgment interests at a rate to be determined by the district court. Exxon and Sea Hawk filed a stipulation with the district court stating that they had "reached an agreement to settle Sea Hawks' compensatory damages claim" but that they had "stumbled over the issue of the rate of interest." Pet. App. 29, 73. Exxon argued that the rate should be dictated by federal law whereas Sea Hawk argued that the higher rate under Alaska law applied. Pet. App. 29. But the parties agreed that prejudgment interest would be compounded, and the district court accepted that agreement in its April 12, 2005 order regarding Sea Hawk's "Motion to Determine Rate of Interest." Pet. App. 27-46. Addressing that issue, the district court stated:

> Sea Hawk raised the issue of whether prejudgment interest should be compounded annually. Exxon states that it has voluntarily agreed to compound the interest annually. *See* Memorandum of Points and Authorities in Opposition to Sea Hawk Seafoods' Motion to Depart from Order No. 299 at 23, Clerk's Docket No. 8055.

Pet. App. 30 n.8. The district court therefore concluded that "[t]he parties have agreed that prejudgment interest will be compounded annually; so, the motion is granted as to that issue." Pet. App. 46.

The issue of whether the federal or state interest rate would apply was ultimately resolved in Sea Hawk's favor. In *Sea Hawk Seafoods*, an opinion authored by Ninth Circuit Judge Susan Graber, the court concluded that state law, not federal law, governed the rate of prejudgment interest in the settlement agreement between Sea Hawk and Exxon and remanded the case to the district court to reexamine whether such interest would be simple or compound. 484 F.3d at 1103. On remand, Sea Hawk filed a motion asking the district court to require Exxon to pay compound interest as the parties had agreed. Sea Hawk claimed it was entitled to compound interest based on a written agreement, drafted by Charles Diamond as counsel for Exxon and signed by both parties, stating without qualification that "[t]he parties also agreed that prejudgment interest will be compounded annually." Pet. App. 51.

Significantly, Exxon specifically and repeatedly confirmed this agreement to pay compound interest in statements that its counsel made to both lower courts in this matter. Exxon represented to the Ninth Circuit in a brief filed on December 5, 2005, with emphasis supplied by Exxon itself, that "interest is to be *compounded*." Pet. App. 54 n.9. Exxon similarly informed the Ninth Circuit at oral argument on February 7, 2007 that federal law should govern the applicable interest rate "because the stipulation provides for interest to be compounded." Pet. App. 58. Exxon also informed the district court in an opposition brief filed on January 21, 2005 that "Exxon voluntarily agreed to compound interest and factored that in to the computation of what it agreed to tender Sea Hawk." Pet. App. 71 n.16.

In deciding Sea Hawk's motion to require Exxon to pay compound interest as the parties had agreed, the district court first determined that under Alaska law Exxon would not be required to pay compound interest unless there was an agreement between the parties providing for such interest. Pet. App. 8. The court specifically addressed the letter drafted by Exxon's counsel – also referred to as the "Diamond Agreement" – and concluded that it "constituted a separate, independent agreement between the parties." Pet. App. 18. The court then interpreted the agreement and concluded that although Sea Hawk's proposed interpretation of the key paragraph is "not unreasonable," Exxon's statement regarding compounding – that "[t]he parties also agreed that

prejudgment interest will be compounded annually" – was limited to prejudgment interest calculated under federal law and somehow excluded prejudgment interest calculated under state law. Pet. App. 18, 51.

The Ninth Circuit affirmed in a 2-1 memorandum disposition joined by Judges Jay Bybee and Diarmuid O'Scannlain. Pet. App. 1-3. In dissent, Judge Graber, who wrote the opinion remanding the case to the district court in the first instance, soundly rejected both Exxon's arguments and the panel majority's analysis:

> I respectfully dissent, because the district court clearly erred in finding that the agreement to pay compound interest depended on the application of a federal rate of interest. First, Exxon's letter states without qualification that the parties had agreed to annual compounding of interest. Because the question whether state or federal law supplied the rate was being litigated actively, and had been reserved for appeal, the lack of qualification is significant. Second, under Alaska law, a contractual ambiguity is construed against the drafter, which was Exxon. Third, the provision makes the most sense when applied to Alaska law, which requires an agreement to support compounding of interest.

Pet. App. 3 (citations omitted). As can be seen, it was significant to Judge Graber that Exxon's statements regarding compound interest were "without qualification."

Sea Hawk subsequently filed a petition for panel rehearing arguing that Exxon should be required to pay Sea Hawk compound interest as it expressly agreed to do and as it subsequently represented to the Ninth Circuit, to the district court, and to Sea Hawk. That petition was assigned to a three-judge panel composed of Judges Jay Bybee, Marsha Berzon, and Raymond Fisher. On March 25, 2009, the court issued an order stating that "Judges Berzon and Bybee have voted to deny Sea Hawk's petition for panel rehearing. Judge Fisher would grant the petition." Pet. App. 47.

REASONS FOR GRANTING THE PETITION

As discussed above, Exxon's attorneys have repeatedly represented to the lower courts in this matter that Exxon agreed to pay Sea Hawk compound interest. Specifically:

- Exxon informed the district court in an opposition brief filed on January 21, 2005 that "Exxon voluntarily agreed to compound interest and factored that in to the computation of what it agreed to tender Sea Hawk." Pet. App. 71 n.16.[1]

[1] As noted on pages 2-3 above, the district court accepted Exxon's representation in its April 12, 2005 order regarding Sea Hawk's "Motion to Determine Rate of Interest." Pet. App. 30 n.8.

- Exxon informed the Ninth Circuit in a brief filed on December 5, 2005, with emphasis supplied by Exxon itself, that "interest is to be *compounded*." Pet. App. 54 n.9.

- Exxon similarly informed the Ninth Circuit at oral argument on February 7, 2007 that federal law should govern the applicable interest rate "because the stipulation provides for interest to be compounded." Pet. App. 58.

These statements are entirely consistent with the Diamond Agreement, which Exxon's lawyer drafted and which both Exxon and Sea Hawk signed, which similarly states that "[t]he parties also agreed that prejudgment interest will be compounded annually." Pet. App. 51.

Exxon made these statements to the lower courts in this matter to persuade them to calculate prejudgment interest relating to its settlement agreement with Sea Hawk in accordance with the lower interest rate dictated by federal law rather than the higher rate required by Alaska law. Exxon apparently gambled that its agreement to compound interest would be rewarded with the lower interest rate under federal law, which provides for compound interest regardless of whether the parties agreed to such. But having lost that bet, Exxon cannot now reverse course and pretend that it never agreed to compound interest in the first instance.

This issue – whether Exxon can "reverse course" – is governed by judicial estoppel principles, which have divided lower courts since this Court issued its seminal opinion in *New Hampshire v. Maine*, 532 U.S. 742 (2001). The Court in *New Hampshire* articulated three considerations for applying judicial estoppel but made clear that "[i]n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." 532 U.S. at 751. Yet many courts have done exactly that, by imposing rigid requirements for establishing judicial estoppel. Those requirements vary from circuit to circuit: some focus on whether the court was in fact misled, while others focus on whether a litigant was successful in asserting its prior position. Other courts have refused to impose such requirements, focusing instead on preventing litigants from playing "fast and loose" with the federal judiciary.

The result, as noted by a leading treatise regarding civil procedure, is a "lack of any uniform approach among the federal courts." 18B Charles Alan Wright et al. *Federal Practice and Procedure* § 4477, at 550 (3d ed. 2002). Indeed, the resulting conflict has been expressly recognized by both the Eleventh Circuit and the First Circuit and exists not only *between* circuits but *within* circuits as well. The Court should grant this petition to provide adequate guidance on this important question of federal law, as well as for the additional reasons set forth below.

I. THERE ARE WELL-ESTABLISHED INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICTS REGARDING THE PROPER APPLICATION OF JUDICIAL ESTOPPEL PRINCIPLES.

A. The Court's Seminal Opinion In *New Hampshire*.

As noted previously, *New Hampshire* is this Court's seminal opinion regarding judicial estoppel. That matter involved a dispute over a portion of the boundary line between New Hampshire and Maine in the area separated by the Piscataqua River. 532 U.S. at 745. New Hampshire filed the original action, claiming that its territory extended all the way to the Maine shoreline of the Piscataqua River. *Id.* Yet in an earlier dispute, New Hampshire had expressly "agreed without reservation" in a signed consent decree that a 1740 decree of King George II fixed the boundary in the "Piscataqua Harbor area" at the middle of the Piscataqua River main channel of navigation. *Id.* Maine therefore argued that New Hampshire was judicially estopped from contradicting its prior statement. *Id.* at 748.

The Court rejected New Hampshire's attempts to distance itself from its prior statement and concluded "that New Hampshire is judicially estopped from asserting now that the boundary runs along the Maine shore." *Id.* at 745. In dismissing New Hampshire's case, the Court surveyed the case law on judicial estoppel. Although the Court cautioned that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not

reducible to any general formulation of principle," it identified three factors to guide courts in applying judicial estoppel:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position so that judicial acceptance would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750 (citations and quotation marks omitted). In the intervening eight years since the Court decided *New Hampshire*, the opinion has been cited more than a thousand times. Unfortunately, courts have struggled in applying *New Hampshire* and have reached conflicting results, thus meriting this Court's review.

B. Courts Have Reached Conflicting Results In Applying *New Hampshire*.

Since this Court issued its opinion in *New Hampshire*, lower courts have developed at least two different – and conflicting – approaches to judicial estoppel.

First, there is an inter-circuit conflict regarding whether judicial estoppel principles are applicable if and only if a party "succeeds" in asserting its prior position. A significant number of courts have held that judicial estoppel does not apply unless a litigant's previous inconsistent position was "adopted" or "accepted" by the tribunal in which it was advanced. A leading example of this approach is the Second Circuit's opinion in *Stichting v. Schreiber*, 407 F.3d 34 (2d Cir. 2005). A central issue in *Stichting* was whether an assignment of a legal malpractice claim was valid under New Jersey law. *Id.* at 41. In an earlier phase of the lawsuit, Schrieber argued that the assignment was valid. In a later phase, Schreiber took a contrary position and argued that the assignment was invalid. *Id.* at 42. Stichting argued that Schrieber was judicially estopped from changing its position, but the Second Circuit rejected the argument on the sole basis that Schrieber's earlier position had not been accepted by the district court. *Id.* at 45. The court held that this "requirement" for invoking judicial estoppel had not been satisfied. *Id.* Other courts similarly require that a party "succeed" in asserting its prior position.[2] Still others have

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[2] *See, e.g., Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 147 (2d Cir. 2005) ("Our circuit has consistently limited the application of judicial estoppel to 'situations where a party both takes a position that is inconsistent with one taken in a prior proceeding, and has had that earlier position adopted by the tribunal to which it was advanced.'" (citations omitted)); *Pennycuff v. Fentress Cty. Bd.*, 404 F.3d 447, 452-53 (6th Cir. 2005) ("We have placed particular emphasis on the second factor,

(Continued on following page)

adopted this so-called "requirement," but have held that "success" can be measured by something short of prevailing on the merits.[3]

By contrast, a number of courts have rejected such a requirement. The Third Circuit's decision in *Krystall Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors*, 337 F.3d 314 (3d Cir. 2003), is illustrative. The district court in *Krystall* held that judicial estoppel principles precluded Krystall from asserting a claim against General Motors for improper termination of its franchise because it had knowingly limited its disclosure of that claim in an earlier bankruptcy proceeding "in the hope of retaining any recovery for itself." *Id.* at 320. Specifically addressing whether a party must successfully assert an inconsistent position in a prior proceeding in order

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stating that judicial estoppel governs a dispute only if the first court adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." (internal quotation marks and citations omitted)).

[3] *See, e.g., Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 n.5 (6th Cir. 1982) ("A party need not finally prevail on the merits in the first proceeding. Rather, judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition."); *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 659-61 (7th Cir. 2004) (finding success test met even though contrary position was reversed on appeal, focusing on "antifraud policy that animates the doctrine"); *Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879, 887-88 (7th Cir. 2005) (success prong satisfied by settlement agreement, "regardless of whether a judicial decision was obtained").

to invoke judicial estoppel principles, the Third Circuit held that "the application of judicial estoppel does not turn on whether the estopped party actually benefited from its attempt to play fast and loose with the court." *Id.* at 324. Other courts have similarly held.[4]

This conflict between the circuits is widely recognized. In *Transamerica Leasing, Inc. v. Institute of London Underwriters*, 430 F.3d 1326 (11th Cir. 2005), the Eleventh Circuit expressly noted that "[t]his question has divided the circuits." *Id.* at 1336 n.8. The court explained that the First, Second, and Sixth Circuits require judicial acceptance before judicial estoppel principles apply, whereas the Seventh and Ninth Circuits do not. *Id.* In *Thore v. Howe*, 466 F.3d 173 (1st Cir. 2006), the First Circuit similarly noted that "[o]ther circuits have articulated other criteria" and identified a split on this issue between the First and Third Circuits. *Id.* at 182 n.2. Indeed, in at least

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[4] *See, e.g., Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1048-49, 1050 (9th Cir. 2004) (plaintiff who abandoned one of two claims to avoid dismissal of that claim was judicially estopped from later reasserting abandoned claim; "[t]his change in position is precisely the kind of playing fast and loose with the courts that the judicial estoppel doctrine is designed to prevent" (quotation marks omitted)); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (concluding that Eleventh Circuit requires only (1) whether alleged inconsistent statement was made under oath and (2) whether statement was calculated to make mockery of judicial system, and concluding that these two factors satisfy *New Hampshire*).

two instances, this conflict has been recognized *even within the same circuit.*[5]

Second, there is also a conflict relating to whether the prior court must be misled by the litigant's prior position or whether all that matters is if the prior court *could have been misled.* The Court first addressed this issue in *New Hampshire*, noting that one reason to strictly apply judicial estoppel principles is that judicial acceptance of inconsistent positions "would create 'the *perception* that either the first or the second court was misled.'" 532 U.S. at 750 (emphasis added) (quoting *Edwards*, 690 F.2d at 598). This focus on "the perception that either the first or the second court was misled" is consistent with the purpose of judicial estoppel, which is to protect "the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions

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[5] Seventh Circuit: *Compare Duthie v. Matria Healthcare, Inc.*, 540 F.3d 533, 542 (7th Cir. 2008) (requiring court to "adopt" previous position), *with Commonwealth Ins. Co.*, 398 F.3d at 887-88 (settlement agreement qualified for judicial estoppel "regardless of whether a judicial decision was obtained"). Ninth Circuit: *Compare United Steelworkers of Am. v. Retirement Income Plan For Hourly-Rated Employees of ASARCO, Inc.*, 512 F.3d 555, 563-64 (9th Cir. 2008) (requiring judicial acceptance), *with Wagner*, 354 F.3d at 1050 (applying fast-and-loose test without formal judicial acceptance). The Fifth and Eighth Circuits, in contrast, remain undecided on this decisive issue. *See Hopkins v. Cornerstone Am.*, 545 F.3d 338, 348 n.2 (5th Cir. 2008) (noting uncertainty over whether judicial acceptance is required following *New Hampshire*); *Cooley v. Daimler Chrysler Corp.*, 281 F. Supp. 2d 979, 987-88 (E.D. Mo. 2003) (Eighth Circuit has yet to adopt position).

according to the exigencies of the moment." *Id.* at 749-50 (quotation marks and citations omitted).[6] As this Court recognized more than a century ago: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold." *Ohio & M.R. Co. v. McCarthy*, 96 U.S. 258, 267-68 (1877).

Notwithstanding this Court's reasoning in *New Hampshire*, a number of courts have held that judicial estoppel principles are not applicable unless the prior court was *actually* misled. A leading example of this is the Second Circuit's opinion in *Uzdavines*. There, Uzdavines' widow filed a claim for death benefits against Weeks under the Longshore Harbor Workers Compensation Act ("LHWCA"). 418 F.3d at 140. During an earlier disability proceeding, Weeks had stipulated that the decedent was covered by the LHWCA. *Id.* at 141. Yet in the death benefits case, Weeks argued that Uzdavines was not covered under the LWHCA. The Second Circuit held that judicial estoppel principles were not applicable because "[n]o one – not ALJ Romano, not ALJ Kaplan, not the Board, and not petitioner – was 'misled' by the

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[6] *See* Wright, *supra*, § 4477, at 551 ("Courts also focus on the sheer effrontery of advocates who, by playing fast and loose with the courts, seem in the pursuit of wanton self-interest to trifle with the dignity of judicial truth-finding efforts.").

parties' stipulation in the original disability claim proceeding, and the judicial integrity of the Board's determination was not compromised by the parties' stipulation." *Id.* at 148. Thus, the court held that parties can assert inconsistent statements without fear of estoppel as long as no one is misled. Other courts have similarly so held.[7] This body of law directly conflicts with the Court's holding in *New Hampshire*, thus providing yet another reason that this petition should be granted.

II. THIS MATTER RAISES IMPORTANT ISSUES THAT MERIT THIS COURT'S REVIEW.

This Court should grant this petition for certiorari because, as noted above, there are well-established inter-circuit and intra-circuit conflicts regarding the proper application of judicial estoppel principles. Moreover, the matter raises fundamental issues of judicial integrity that go to the core of our judicial system. Judicial estoppel principles operate as a check on the adversarial process. While advocates are

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[7] *See, e.g., Thore*, 466 F.3d at 184 (considering whether "the defendant or the government has *necessarily* misled" previous court). *Ameritox, Ltd. v. Aegis Corp.*, No. 07-80498-CIV, 2008 WL 4540063, at *3 (S.D. Fla. Oct. 10, 2008) ("With respect to *New Hampshire's* second factor, the Court notes simply that it was not misled."); *In re Oneida Ltd.*, 383 B.R. 29, 46-47 (Bankr. S.D.N.Y. 2008) ("There is no threat to judicial integrity when neither the parties nor the tribunal is misled."). The Ninth Circuit below reached the same result. *See* Pet. App. 3 (panel majority, noting that "the court was not misled").

required to strongly and persuasively present their legal arguments, zealous advocacy is ultimately limited by the facts of a case. Where a party has presented facts in a particular manner and has represented those facts as true, it cannot be heard to contradict itself and say that those same facts are not true. Allowing such gamesmanship – as the Ninth Circuit did – would "undermin[e] the integrity of the judicial process." *New Hampshire*, 532 U.S. at 755.

Indeed, Justice Scalia strongly reinforced this point during oral argument in *New Hampshire*, chastising New Hampshire for signing a consent decree stating that the boundary was set at the middle of the river and then arguing otherwise:

> Well, then you shouldn't lie about it. If you think it's arbitrary, you shouldn't sign a piece of paper that says that the Order of the King and Council says this, and what the Order means is this. . . . That is simply incompatible with getting up and saying the line is arbitrary. If you believed it was arbitrary, you shouldn't have signed this [it] seems to me, and I think we can hold you to what you sign.

Oral Argument, *New Hampshire v. Maine*, 2001 WL 417672, at *37 (U.S. Apr. 16, 2001) (No. 130). Here too, Exxon signed a piece of paper stating *without qualification* that "[t]he parties also agreed that prejudgment interest will be compounded annually." Pet. App. 51. And its counsel specifically confirmed this agreement in statements made to both lower courts

in this matter. *See supra* at 6-7. As Justice Scalia noted, courts should "hold" Exxon to those statements.

It is equally clear that the Ninth Circuit erred, to the significant detriment of Sea Hawk. The Ninth Circuit allowed Exxon to contradict its earlier statements because "the court was not misled." Pet. App. 3. As discussed in Section I above, that is not a proper application of this Court's holding in *New Hampshire*. Worse, such an exception to judicial estoppel ignores its fundamental purpose, which is to protect the integrity of the judicial process. *New Hampshire*, 532 U.S. at 749-50. As the Court noted more than a century ago in *Davis v. Wakelee*, 156 U.S. 680 (1895), such self-serving contradictions are "contrary to the first principles of justice." *Id.* at 691.[8] Because of the long delay in making payment to Sea Hawk, the difference between simple and compound interest totals approximately $4 million that would be used to pay down the debt Sea Hawk has been forced to bear in its pursuit of justice. Exxon should not be permitted to avoid that responsibility simply because the Ninth Circuit concluded – without explanation or support in the record – that "the court was not misled." Pet. App. 3.

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[8] The Court first applied the doctrine of judicial estoppel over 150 years ago. *Sample v. Barnes*, 55 U.S. 70 (1852); *Cavendar v. Cavendar*, 114 U.S. 464 (1885).

In addition, given the facts at issue here, it is especially important that Exxon be held accountable. In *Baker*, the majority described the evidence showing (for example) that "Hazelwood drank with Exxon management and that members of Exxon management knew of his relapse." 128 S. Ct. at 2612. Justice Breyer likewise noted that "[t]he jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for many plaintiffs in this case." *Id.* at 2640 (concurring in part and dissenting in part). Justice Ginsberg similarly described the resulting harm as "[h]orrendous." *Id.* at 2639 (concurring in part and dissenting in part). Despite such facts, the Court reduced Exxon's liability for punitive damages from $5 billion as awarded by the jury to $507.5 million (a ten-fold reduction). 128 S. Ct. at 2633-34. Exxon has no doubt become comfortable over the last 20 years with its practice of progressively limiting its liability to the many businesses and individuals whose livelihood was devastated by its negligence. Clearly, the time has come to require Exxon to honor its promise that "prejudgment interest will be compounded annually." Pet. App. 51.

Finally, the issues in this case also affect the efficacy of the judicial process. The Court has appropriately recognized that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a

contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689 (1985). The same legal principles are equally applicable here. Rather than continuing to litigate against an adversary with unlimited resources, Sea Hawk compromised its claims against Exxon based on Exxon's express agreement that "prejudgment interest will be compounded annually" – an agreement that Exxon repeatedly confirmed in statements that its counsel made to both lower courts in this matter. Here, as in *New Hampshire*, Exxon should be estopped from asserting otherwise.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: EXXON VALDEZ. --- SEA HAWK SEAFOODS, INC., Plaintiff-Appellant, v. EXXON MOBIL CORP.; et al., Defendants-Appellees.	No. 07-35806 D.C. No. CV-89-00095-HRH MEMORANDUM* (Filed Dec. 19, 2008)

Appeal from the United States District Court
for the District of Alaska
H. Russell Holland, District Judge, Presiding

Argued and Submitted December 8, 2008
Portland, Oregon

Before: O'SCANNLAIN, GRABER, and BYBEE, Circuit Judges.

In *Sea Hawk Seafoods, Inc. v. Exxon Corp.* (*In re Exxon Valdez*), 484 F.3d 1098, 1102 (9th Cir. 2007), we held that Alaska law, not federal law, supplied the rate of prejudgment interest for the settlement agreement between Plaintiff Sea Hawk Seafoods and

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendant Exxon Mobil Corp. We remanded to the district court for further proceedings so it could decide whether the rate should be simple or compound. *Id.* at 1103.

Under Alaska law, statutory interest is simple interest unless the parties agree to compounding. Alaska Stat. § 09.30.070(a); *Alyeska Pipeline Serv. Co. v. Anderson*, 669 P.2d 956 (Alaska 1983) (per curiam). After taking evidence and hearing arguments, the district court found that the parties did not agree to compounding. That finding is not clearly erroneous. *See Stephens v. City of Vista*, 994 F.2d 650, 655 (9th Cir. 1993) (noting that when the interpretation of a contract includes review of factual extrinsic evidence, the findings of fact are reviewed for clear error).

Although a letter from Exxon to Sea Hawk stated in part that the parties "agreed that prejudgment interest will be compounded annually," that statement appeared in the context of a ruling by the district court that the federal interest rate applied. The remainder of the letter suggests that the parties made their entire agreement in the light of that ruling and, therefore, in the expectation that federal law governed.

Moreover, the district court did not abuse its discretion, *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1000 (9th Cir. 2007), in refusing to invoke judicial estoppel against Exxon. Although the court recognized that Exxon had previously taken the position that it had voluntarily agreed to compound

interest, the court understood the agreement to be limited to federal law. That is, the court was not misled. *See New Hampshire v. Maine,* 532 U.S. 742, 750-51 (2001).

AFFIRMED.

Sea Hawk Seafoods, Inc. v. Exxon Mobil Corp., No. 07-35806

GRABER, Circuit Judge, dissenting:

I respectfully dissent, because the district court clearly erred in finding that the agreement to pay compound interest depended on application of the federal rate of interest. First, Exxon's letter states without qualification that the parties had agreed to annual compounding of interest. Because the question whether state or federal law supplied the rate was being litigated actively, and had been reserved for appeal, the lack of qualification is significant. Second, under Alaska law, a contractual ambiguity is construed against the drafter, which was Exxon. *Ledgends, Inc. v. Kerr*, 91 P.3d 960, 963 (Alaska 2004) (per curiam) (appendix A). Third, the provision makes the most sense when applied to Alaska law, which requires an agreement to support compounding of interest.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	
This Order Relates to Sea Hawk Seafoods, Inc. and Exxon;	)	No. 3:89-0095-cv-HRH

ORDER NO. 372

Sea Hawk Seafoods, Inc.'s Motion
for Entry of Amended Final Judgment

(Filed Sep. 25, 2007)

Sea Hawk Seafoods, Inc. moves for entry of an amended final judgment.[1] This motion is opposed.[2] Oral argument was requested and has been heard.

Background

Sea Hawk Seafoods, Inc. is a seafood processing company with one plant in Valdez, Alaska. On or about March 31, 1989, Sea Hawk filed a complaint in state court against Exxon Mobil Corporation and Exxon Shipping (hereinafter "Exxon") for damages arising out of the *Exxon Valdez* oil spill. In 2004, Sea Hawk and Exxon reached an agreement to settle Sea

[1] Docket No. 8547.

[2] Docket No. 8571.

Hawk's damages claims except for one issue,[3] prejudgment interest. The parties stipulated that Sea Hawk could move for a determination of the appropriate rate and amount of interest. The court approved the parties' stipulation on September 29, 2004.[4] In Order No. 369,[5] the court determined that the federal rate of prejudgment interest, as prescribed by 28 U.S.C. § 1961(a), governed. The court also granted Sea Hawk's motion as to whether interest would be simple or compound, holding that interest would be compounded because "[t]he parties have agreed that prejudgment interest will be compounded annually[.]"[6]

Sea Hawk appealed. The Ninth Circuit Court of Appeals reversed this court, holding "that the district court erred by not applying Alaska law to Plaintiff's Alaska state law claim for prejudgment interest." *In re Exxon Valdez,* 484 F.3d 1098, 1102 (9th Cir. 2007). The court of appeals observed that "[t]he parties agree that, under Alaska state law, the applicable rate of interest in this case is 10.5%" but that they dispute "whether under Alaska state law, the interest should be compound or simple." *Id.* at 1102-03. The

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[3] Stipulated Notice and [Proposed] Order re Status of Settlement Negotiations and Agreement to Seek the Court's Determination of Pre-judgment Interest, Clerk's Docket No. 8015.

[4] Docket No. 8015.

[5] Docket No. 8099.

[6] *Id.* at 19.

court of appeals concluded that "on remand, the district court should limit its inquiry to that determination." *Id.* at 1103.

On remand, the court vacated Order No. 369 "as regards the rate of interest and calculation of interest[.]"[7] The court ordered counsel to confer and to "propose to the court an amended final judgment on Sea Hawk Seafoods' claim which calculates interest in accordance with the judgment of the court of appeals."[8] In response to the court's order, Sea Hawk filed the instant motion, in which it seeks to have the court order Exxon to pay compound prejudgment interest. Sea Hawk contends that Exxon, as part of its settlement with Sea Hawk, agreed to pay compound prejudgment interest.

Discussion

As an initial matter, Exxon argues that the question of whether the parties contracted to compound interest is beyond the scope of the Ninth Circuit's mandate. Exxon contends that the only question the court can consider is the "single, unambiguous legal determination"[9] of whether Alaska state law requires simple or compound interest.

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[7] Order re Judgment Vacated in Part (May 15, 2007) at 1, Docket No. 8542.

[8] *Id.* at 2.

[9] Memorandum of Defendants Exxon Mobil Corporation (D-1) and Exxon Shipping Company (D-2) in Opposition to Plaintiff

(Continued on following page)

"According to the rule of mandate, although lower courts are obliged to execute the terms of a mandate, they are free as to 'anything not foreclosed by the mandate[.]' " *United States v. Kellington,* 217 F.3d 1084, 1092-93 (9th Cir. 2000) (quoting *Herrington v. County of Sonoma,* 12 F.3d 901, 904 (9th Cir. 1993)). "[I]n construing a mandate . . . the ultimate task is to distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not" been decided. *Id.* The Ninth Circuit did not decide whether compound or simple interest applied in this situation. The Ninth Circuit remanded that question to this court. This court's task is to determine whether Sea Hawk is entitled to compound or simple prejudgment interest under Alaska law. The Alaska interest statute, as it existed at the time Sea Hawk's claims accrued, provided:

> The rate of interest on judgments and decrees for the payment of money is 10.5 percent a year, except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

Sea Hawk Seafoods, Inc.'s Motion for Entry of Amended Final Judgment at 4, Docket No. 8571.

AS 09.30.070(a) (1992). Although Alaska courts interpreted AS 09.30.070(a) as not providing for compound interest, *see Alyeska Pipeline Service Co. v. Anderson,* 669 P.2d 956, 956 (Alaska 1983), the statute also provides that parties can contract to pay prejudgment interest at a rate other than that set by the statute as long as the specified rate does not exceed the legal rate of interest. AS 09.30.070(a) (1992). The court concludes that Alaska law allows parties to contract for compound interest; and therefore, it is within the scope of the mandate for the court to consider whether such an agreement exists between Sea Hawk and Exxon.

The parties' settlement agreement was memorialized in a letter dated December 1, 2004 from Marvin S. Putnam, Exxon counsel's, to John G. Young, Sea Hawk's counsel. The Putnam letter provides that "[t]he parties have agreed to settle this matter for $2,146,908 plus any applicable interest.[10] The Putnam letter further provides that although the parties have agreed that interest will be paid on the underlying $2,146,908, "they have not agreed as to the appropriate interest rate or amount."[11] Per the Putnam letter, Exxon agreed to pay $742,799 in prejudgment interest, which was based on the federal rate, but Sea Hawk "contends a higher interest rate is warranted, and will seek an order of the Court providing for such

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[10] Putnam Letter at 1, Exhibit A, Declaration of Marvin S. Putnam, Docket No. 8572.

[11] *Id.*

a higher interest rate."[12] Terry R. Bertoson, president of Sea Hawk, signed off on the Putnam letter.

The Putnam letter is silent as to whether prejudgment interest would be compound or simple. This is not surprising because the parties, in the negotiations leading up to the Putnam letter, had focused on the *rate* of prejudgment interest and not on whether prejudgment interest would be simple or compound. As the court recently noted, "the rate of interest and the treatment of the accrual of interest are two entirely separate concerns."[13]

The parties' settlement negotiations began with a letter from Sea Hawk's counsel to Exxon's counsel on March 23, 2004.[14] While the initial negotiations focused on the amount of Sea Hawk's compensatory damages, references were made to prejudgment interest. The parties originally appeared to agree that prejudgment interest would be calculated based on federal law, which provides for compound interest.[15]

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[12] *Id.* at 1-2.

[13] Order No. 370 at 8, Docket No. 8616.

[14] *See* Exhibit A, Declaration of Charles P. Diamond, Docket No. 8609.

[15] *See* March 23, 2004 letter from Young to Diamond at 3, Exhibit A, ("Interest would, of course, also be due on the total settlement amount calculated according to Order 299."); May 10, 2004 letter from Diamond to Young at 4, Exhibit E, ("To this we would be prepared to add pre-judgment interest computed pursuant to Order No. 299."); Diamond Declaration, Docket No. 8609. Order No. 299 provided that the prejudgment interest rate be "fixed pursuant to 28 U.S.C. § 1961." *See* Docket No. 6466 at

(Continued on following page)

By mid-June 2004, however, the parties no longer had any agreement as to the "applicable interest *rate*"[16] and letters exchanged throughout the rest of the summer of 2004 reflect this disagreement over the *rate* of prejudgment interest.

On September 27, 2004, the parties submitted a stipulation to the court advising that they had

> reached an agreement to settle Sea Hawk's compensatory damages claim but those discussions have stumbled over the issue of the *rate* of prejudgment interest that would apply were Sea Hawk to pursue its claim to a favorable judgment, with the Exxon Defendants taking the view that Order 299 directs the use of the federal interest rate prescribed in 28 U.S.C. § 1961 and Sea Hawk contending that the circumstances of this case entitle it to a higher *rate* of interest[.[17]]

The parties stipulated "that Sea Hawk may move for determination of the appropriate *rate* of prejudgment

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7. Order No. 299 is silent as to whether prejudgment interest would be simple or compound because section 1961 expressly provides that interest "shall be compounded annually." 28 U.S.C.1961(b).

[16] Letter from Young to Diamond (dated June 15, 2004) at 4, Exhibit H, Diamond Declaration, Docket No. 8609 (emphasis added).

[17] Stipulated Notice and Order re Status of Settlement Negotiations and Agreement to Seek the Court's Determination of Pre-judgment Interest at 2, Docket No. 8015 (emphasis added).

interest on this settlement."[18] The stipulation, like the Putnam letter, is silent as to whether prejudgment interest would be simple or compound.

In its opening brief on the prejudgment interest issue, Sea Hawk requested that it be awarded prejudgment interest at a rate "ranging from 29.32% to 9.20% per annum, compounded annually."[19] As to the compound/simple issue, Sea Hawk argued that "any rate selected should be compounded."[20] Sea Hawk contended that the court, under federal maritime law, had the discretion to order compound interest no matter which law, state or federal, it determined governed prejudgment interest.[21] In response, Exxon agreed that it was within the court's discretion to decide whether prejudgment interest should be compounded, and stated that "Exxon voluntarily agreed to compound interest and factored that in to the computation of what it agreed to tender to Sea Hawk."[22]

What the parties said in their briefing to the court is not part of the negotiated settlement between

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[18] *Id.* (emphasis added).

[19] Plaintiff Sea Hawk Seafoods' Motion to Determine Rate of Prejudgment Interest for Final Settlement Purposes at 22, Docket No. 8042A.

[20] *Id.* at 20.

[21] *Id.* at 20-21.

[22] Memorandum of Points and Authorities in Opposition to Sea Hawk Seafoods' Motion to Depart from Order No. 299 at 23, n.16, Docket No. 8055.

the parties and was said in the context of legal argument. In response to Sea Hawk's argument that the court had the discretion to decide whether prejudgment interest should be simple or compound, Exxon acknowledged that federal law requires compound interest and made reference to the manner in which it had calculated the prejudgment interest that it had already tendered to Sea Hawk, which Exxon had computed by relying on Order No. 299 and 28 U.S.C. § 1961. Nothing in what Exxon said in its briefing on Sea Hawk's first interest motion is evidence that Exxon had agreed, as part of its settlement with Sea Hawk, to pay compound interest regardless of what law governed. Moreover, it is significant that Sea Hawk felt compelled to submit the compound/simple interest question to the court in its first motion on prejudgment interest. Sea Hawk contends that it did so "[t]o be safe."[23] But if the parties had agreed, as part of their settlement, that Exxon would pay compound interest no matter what, then there would have been no need for Sea Hawk to address the compound/simple interest question in its first interest motion.

In Order No. 369, the court made reference to Exxon's "agreement" to pay compound interest. In a footnote, the court observed that "Sea Hawk raised the issue of whether prejudgment interest should be

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[23] Plaintiff Sea Hawk Seafoods' Reply in Support of Motion for Entry of Amended Final Judgment at 8, Docket No. 8577.

compounded annually. Exxon states that it has voluntarily agreed to compound the interest annually."[24] This reference is nothing more than a restatement of what Exxon said in its briefing to the court. In the conclusion of Order No. 369, the court stated:

> Plaintiff Sea Hawk Seafoods' motion for a determination that it be awarded prejudgment interest for its settlement with Exxon at a rate somewhere between 9.20% and 29.32% per annum, compounded annually, is granted in part and denied in part. The parties have agreed that prejudgment interest will be compounded annually; so, the motion is granted as to that issue. The motion is denied as to the appropriate rate of interest being between 9.20% and 29.32%.
>
> The rate of prejudgment interest that shall apply to the settlement between Sea Hawk and Exxon is 4.11% for the 1992 losses and 3.54% for the 1993 losses.[25]

The "agreement" between the parties to which the court refers here flowed from Sea Hawk's argument that the court had discretion, under federal maritime law, to order that prejudgment interest be compounded, and Exxon's concurrence that the federal rate could be compounded. The court was not making a determination that, as part of its settlement with Sea Hawk, Exxon had agreed to pay compound prejudgment

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[24] Order No. 369 at 4, n.8, Docket No. 8099.

[25] *Id.* at 19.

interest no matter which law governed. At the time of Order No. 369, the court did not believe that Exxon and Sea Hawk had an agreement as to compound interest if state law applied. Rather, it believed that Exxon had agreed to pay compound interest on the amount of prejudgment interest that it had already tendered to Sea Hawk, interest which had been calculated under federal law, which provides for compound interest. The court's reference to' an "agreement" between the parties as to compound interest was a result of there being no *dis*agreement about compounding when the federal rate is employed, not the result of there being an *agreement* that prejudgment interest would be compounded even if state law applied. The court did not believe that the Sea Hawk and Exxon had reached an overarching agreement as to compound interest.

For this reason, and others, Sea Hawk's argument that Exxon is judicially estopped from denying that it agreed to pay compound interest fails. "Judicial estoppel prevents a party from taking inconsistent positions when those inconsistencies have an adverse effect on the judicial process." *Engquist v. Oregon Dep't of Agriculture*, 478 F.3d 985, 1000 (9th Cir. 2007). "Several factors typically inform a court's decision whether to apply judicial estoppel." *Abercrombie & Fitch Co. v. Moose Creek, Inc.*, 486 F.3d 629, 633 (9th Cir. 2007). "First, 'a party's later position must be "clearly inconsistent" with its earlier position.'" *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). "Second, courts often inquire

whether the party achieved success in the prior proceeding, as 'judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" *Id.* "Third, courts consider whether, if not estopped, 'the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the other party.'" *Id.* (quoting *New Hampshire,* 532 U.S. at 751).

The court is not convinced that the position that Exxon takes now is "clearly inconsistent" with its earlier position. As stated above, during the Order No. 369 phase of this litigation, the court did not believe that Exxon had taken the position that it had an agreement with Sea Hawk that it would pay compound interest regardless of whether state or federal law applied. Rather, it was the court's perception that Exxon's position was that prejudgment interest would be compound if federal law applied. The position that Exxon now takes, that it never agreed to pay compound interest if state law applied, is not inconsistent with its earlier position. But, even if Exxon has taken inconsistent positions, this court's acceptance of Exxon's current position would not create a perception that this court was previously misled. As stated above, when this court made reference to Exxon's "agreement" to pay compound interest, it did not believe that Exxon had agreed to pay compound interest even if state law applied. Thirdly, there can be no unfair advantage here because the parties have been given the opportunity to brief and

argue the question of whether the parties had an agreement as to compound interest. In short, Exxon's representations about compound interest made during the litigation of the prejudgment interest question in this court did not in any way bind Exxon to pay compound interest if state law applied.

The same is true of Exxon's representations to the court of appeals. In its briefing to the Ninth Circuit, Exxon argued that Sea Hawk had asked this court "to incorporate an Alaska statute providing for simple interest *only* into a settlement where interest is to be *compounded.*"[26] Sea Hawk insists that this was an admission by Exxon that it had agreed to pay compound interest. But it is not. Rather, it was simply a statement made in the context of Exxon's argument that, in its view, compound interest and AS 09.30.070 are completely inconsistent. This was a statement made in the context of legal argument, and it is entirely consistent with Exxon's argument that compound interest is not allowed under Alaska state law.

At oral argument before the Ninth Circuit, Exxon's counsel stated that "the stipulation provides for interest to be compounded[.]"[27] But, Exxon's counsel also stated that "[t]he parties could have stipulated to

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[26] Joint Answering Brief at 18, n.8, Exhibit E, Declaration of Kevin P. Sullivan, Docket No. 8548.

[27] Transcript of Oral Argument, February 7, 2007, Exhibit F at 2, Sullivan Declaration, Docket No. 8548.

[compound interest]; I don't think they did, or that that's the effect of the stipulation."[28] These equivocal statements during oral argument provide no support for Sea Hawk's contention that Exxon represented to the court of appeals that it had agreed to pay compound interest if state law applied.

A less equivocal statement about the compound/simple interest issue is found in the April 20, 2005 letter from Charles P. Diamond, Exxon's counsel, to John G. Young, Sea Hawk's counsel. The Diamond letter was sent approximately a week after the court entered Order No. 369. In the first paragraph of the April 20, 2005 letter, Diamond writes: "I write to seek your agreement respecting the computation of interest pursuant to Judge Holland's order of last week."[29] In the second paragraph of the April 20, 2005 letter, Diamond writes:

> The parties agreed to settle this matter for a total of $2,146,908, representing damages of $1,616,550 for 1992 and $530,358 for 1993, with interest accruing from July 1 of each year through the date of payment. *The parties also agreed that prejudgment interest will be compounded annually.*[30]

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[28] *Id.*

[29] Exhibit D at 1, Sullivan Declaration, Docket No. 8548. *Id.* (emphasis added).

[30] *Id.* (emphasis added).

In the third paragraph, Diamond writes:

> Last week the Court decided that we use rates of 4.11% for 1992 damages and 3.54% for 1993 damages. These rates provide an interest figure of $1,097,317.08 for 1992 damages and $270,928.61 for 1993 damages, compounded through May 1, 2005, for a total settlement of $3,515,153.69. Offset by the $2,889,707.63 already paid, Exxon Mobil owes Sea Hawk $625,446.06.[31]

The Diamond letter was countersigned by Sea Hawk's counsel, John G. Young and thus constituted a separate, independent agreement between the parties.

Sea Hawk insists that in the Diamond letter Exxon unambiguously agreed to pay compound interest, with no qualifications. The sentence that reads "[t]he parties also agreed that prejudgment interest will be compounded annually" plainly says, with no limitations or qualifications, that the parties had an agreement that prejudgment interest would be compound. Diamond uses the past tense, saying "the parties also *agreed*", which could imply that he is referring to the parties' initial agreement as set forth in the Putnam letter. The "compounded annually" sentence is also placed in the same paragraph that lays out the other terms of the parties' settlement agreement. Thus, if the court looks only to the second

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[31] *Id.*

paragraph of the Diamond letter, Sea Hawk's interpretation of the Diamond letter is not unreasonable.

But, in interpreting a contract, the court must look to the contract as whole, as well as the extrinsic evidence, in order to determine if a proposed interpretation is reasonable. *See Rockstad v. Erikson,* 113 P.3d 1215, 1222 (Alaska 2005). In the first paragraph, Diamond advises that he is seeking "an agreement respecting the computation of interest pursuant to Judge Holland's order of last week." That reference is, of course, to Order No. 369. It is in the context of that order, which adopted the federal rate of interest and called for compounding in reciting the parties' settlement, that Diamond says "the parties also agreed that prejudgment interest will be compounded annually." While the use of the past tense may suggest that Diamond was referring to the Putnam letter, the subject matter of the Diamond letter was what was due Sea Hawk under Order No. 369. It is more likely that Diamond was referring to Sea Hawk's argument and Exxon's concession that the federal rate of interest would be compounded, especially given that prior to April 20, 2005, there is no evidence of the parties having reached an agreement that prejudgment interest would be compounded if state law applied. When considering the Diamond letter as a whole, plus the extrinsic evidence, Sea Hawk's interpretation that the Diamond letter is an agreement to compound *any* interest rate that might be applied is not reasonable. The only reasonable interpretation of the Diamond letter is that the "agreement" was that

the *federal* rate, which the court had imposed in Order No. 369, should be compounded.

Based on the foregoing, the court concludes that the parties did not have an agreement as to compound interest if state law applied. The Putnam letter, which memorialized the parties settlement agreement, is silent as to whether prejudgment interest would be compound or simple; and the agreement that the parties reached thereafter in the Diamond letter as to compounding interest was made in the context of Order No. 369, which held that the federal interest rate should apply. Finally, nothing that occurred during the litigation of the prejudgment interest issue in this court or the court of appeals bound Exxon to pay compound prejudgment interest if state law applied. In sum, the parties never agreed that Exxon would pay compound interest regardless of whether state or federal law governed. Absent such an agreement, Sea Hawk is entitled to simple interest at the rate of 10.5% per annum on Sea Hawk's respective damage amounts for 1992 and 1993, from July 1 of each year through the date of payment.

Conclusion

Sea Hawk's motion[32] for entry of its proposed amended final judgment compounding interest at 10.5% is denied. Counsel for the parties shall please

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[32] Docket No. 8547.

confer, and on or before August 13, 2007, propose to the court an amended final judgment on Sea Hawk Seafoods' claims which calculates prejudgment interest in accordance with the judgment of the court of appeals and this order.

DATED at Anchorage, Alaska, this 27th day of July, 2007.

/s/ H. Russel Holland
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	
This Document Relates to SEA HAWK SEAFOODS, INC., and EXXON	)	No. 3:89-cv-0095-HRH

AMENDED FINAL JUDGMENT
ON CLAIMS OF SEA HAWK SEAFOODS, INC.

(Filed Aug. 27, 2007)

Pursuant to the Stipulation appearing at Clerk's Docket No. 8674,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED as follows:

1. Judgment is entered in favor of Exxon Mobil Corporation (D-1) and Exxon Shipping Company (D-2) (collectively, "Exxon") and against plaintiff Sea Hawk Seafoods, Inc. ("Plaintiff" or "Sea Hawk") dismissing with prejudice all Claims of Plaintiff, and forever releasing and discharging Exxon, its parent, subsidiary and affiliated corporations, and its and their officers, directors, employees, agents, attorneys, heirs, successors, and assigns, and each of them, from any and all Claims of Plaintiff.

2. As used herein, "Claims" means any and all rights, claims, causes of action, and demands of every nature and kind whatsoever, that have previously existed, now exist or may hereafter exist in favor of Plaintiff against Exxon arising out of or related in whole or in part to the Oil Spill (that is, to the grounding of the EXXON VALDEZ on March 24, 1989, the resulting oil spill, all clean-up activities that followed that occurrence, all activities by Exxon in connection with and as a result of that occurrence, and all of the facts and circumstances related to that occurrence that are alleged in any of the complaints, statements of claims or issues or trial plans on file in this Consolidated Proceeding) or to any or all of the actions, omissions, facts, matters, transactions or occurrences that have been or could have been directly or indirectly alleged, asserted, described, set forth or referred to in any of the complaints in this Consolidated Proceeding; *provided*, that "Claims" does not include (1) any demand for relief in the form of punitive damages in favor of any member of the Mandatory Punitive Damages Class, as defined in any of the following orders: Order No. 204 (April 14, 1994), Clerk's Docket No. 4856; Order No. 204 Supplement (April 15, 1994), Clerk's Docket No. 4857; or Order No. 204 Second Supplement (May 12, 1994), Clerk's Docket No. 5032; or (2) any additional prejudgment interest owed by Exxon to Sea Hawk if the Ninth Circuit Court of Appeals shall reverse or modify Order No. 372.

3. Notwithstanding the foregoing, the parties agree that Exxon owes Sea Hawk additional prejudgment interest in light of the Ninth Circuit Court of Appeals' recent judgment (Clerk's Docket No. 8539) and opinion reversing the prior decision of this Court (Order No. 369, Clerk's Docket No. 8099) as regards the appropriate rate of prejudgment interest to be paid by Exxon to Sea Hawk. Prejudgment interest payable to Sea Hawk shall be calculated at the rate of 10.5% simple interest, in accordance with the Ninth Circuit's judgment and opinion, this Court's July 27, 2007 order (Order No. 372, Clerk's Docket No. 8641), and Alaska law, except to the extent that Order No. 372 may be vacated or modified by the United States Court of Appeals for the Ninth Circuit on Sea Hawk's anticipated appeal, in which case the prejudgment interest payable to Sea Hawk shall be calculated in the manner provided in the judgment on that appeal rendered by the Ninth Circuit, subject to the outcome of such further proceedings as may be provided for by the Ninth Circuit or permitted by law. Prejudgment interest, calculated in the foregoing manner, shall be payable on the sum of $1,616,550 for the period from July 1, 1992 to January 24, 2005, and also on the sum of $530,358 for the period from July 1, 1993 to January 24, 2005, for a total of $2,777,260.45. Sea Hawk hereby acknowledges its prior receipt of $1,328,594.74 from Exxon on account of said prejudgment interest, which sum shall be a credit against the amount of prejudgment interest that is now due pursuant to this paragraph and against any larger amount of prejudgment interest that may ultimately be found to be due.

Consistent with the foregoing methodology, Exxon shall pay a total of $1,448,665.71, allocated as follows: (a) Exxon shall pay Sea Hawk the sum of $1,428,229.31; and (b) Exxon shall pay $20,436.40 to Kirin International Trading Inc. ("Kirin"), pursuant to the terms of the parties' June 15, 2007 stipulation with Kirin, in full satisfaction of Exxon's obligations to Sea Hawk for prejudgment interest. The $1,448,665.71 payable by Exxon pursuant to this paragraph shall be a credit against any additional prejudgment interest owed Sea Hawk if the Ninth Circuit Court of Appeals shall reverse or modify Order No. 372.

4. The portion of Order No. 352 that applies to Sea Hawk is vacated.

5. Sea Hawk shall pay to Exxon, out of whatever amount of money Sea Hawk may receive on account of punitive damages awarded against Exxon (including any interest on such punitive damages), a fraction of said amount determined as follows: the numerator of said fraction shall be $2,700,000, and the denominator of said fraction shall be $7,753,168.45, which represents the sum of (a) $4,975,908; (b) $1,328,594.74; and (c) $1,448,665.71; provided, however, that in the event additional prejudgment interest amounts are found to be due under paragraph 3 hereof following appeal, those amounts shall be added to the denominator for this punitive damages fraction.

6. The Stipulation appearing at Clerk's Docket No. 8674 hereby supersedes and replaces the parties'

August 29, 2005 Stipulation for Entry of Final Judgment, appearing at Clerk's Docket No. 8160. By stipulating to the form of this Amended Final Judgment, Sea Hawk does not waive its right to appeal from Order No. 372 and/or this Amended Final Judgment.

7. The Court expressly determines, pursuant to Rule 54(b), Federal Rules of Civil Procedure, that there is no just reason for delay, and expressly directs the entry of this amended final judgment.

DATED at Anchorage, Alaska, this 27th day of August, 2007.

/s/ H. Russel Holland
United States District Judge

2005 WL 936934

United States District Court,
D. Alaska.
In re the EXXON VALDEZ
No. A89-0095-CV (HRH).

April 12, 2005.

ORDER NO. 369

HOLLAND, J.

This Order Relates to Plaintiff Sea Hawk Seafoods, Inc., and Exxon

Motion to Determine Rate of Prejudgment Interest

Procedural History

Plaintiff Sea Hawk Seafoods moves for a determination that the prejudgment interest rate that should apply to its settlement with Exxon Mobil Corporation and Exxon Shipping should be somewhere between 9.20% to 29.32% per annum, compounded annually.[1] This motion is opposed.[2] Oral argument was requested and has been heard.

Background

Sea Hawk Seafoods, Inc., is a seafood processing company with one plant in Valdez, Alaska. On or

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[1] Clerk's Docket No. 8042A.

[2] Clerk's Docket No. 8055.

about March 31, 1989, Sea Hawk filed a complaint in state court against Exxon Mobil Corporation and Exxon Shipping (hereinafter "Exxon") for damages arising out of the *Exxon Valdez* oil spill. Sea Hawk's claims were based on AS 46.03.822, Alaska's strict liability statute for hazardous substances. Sea Hawk's complaint became part of the consolidated state court *Exxon Valdez* oil spill litigation. The consolidated state case was subsequently removed to this court on the basis of federal question jurisdiction.[3]

After removal, Sea Hawk and Exxon reached a settlement as to Sea Hawk's 1989 claim for damages, but not as to Sea Hawk's claims for 1990-1993. On January 26, 1994, Exxon's motion for summary judgment on Sea Hawk's remaining claims was granted.[4] The court dismissed Sea Hawk's claims with prejudice, relying on *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927), which holds that economic recovery is unavailable in admiralty cases absent physical harm. Judgment was entered on Sea Hawk's claims on September 18, 1996.[5] On November 7, 2001,

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[3] *See* Notice of Removal, Clerk's Docket No. 2008. Sea Hawk also filed a complaint in this court on March 31, 1989, for damages arising out of the *Exxon Valdez* oil spill. *See* Clerk's Docket No. 1. Sea Hawk's federal complaint was subsequently amended at Clerk's Docket No. 377. Sea Hawk's federal complaint claims were dismissed voluntarily on September 24, 1992. *See* Clerk's Docket No. 2865.

[4] *See* Order No. 174, Clerk's Docket No. 4444.

[5] *See* Extended Summary Judgment at 5, ¶ 7, Clerk's Docket No. 6909.

the Ninth Circuit reinstated Sea Hawk's damage claims for 1990-1993. *In re Exxon Valdez,* 270 F.3d 1215, 1253 (9th Cir.2001). In doing so, the Ninth Circuit Court of Appeals held that AS 46.03.822 was not preempted by federal admiralty law. *Id.* at 1252-53. The court of appeals remanded Sea Hawk's claims to this court to determine whether Sea Hawk could establish allowable damages. *Id.* at 1253.

On September 27, 2004, the parties submitted a stipulation in which they advised that they had reached an agreement to settle Sea Hawk's damages claims except for one issue.[6] The parties could not agree on what rate of prejudgment interest should apply to the settlement. Exxon took the view that Order No. 299[7] directs the use of the federal interest rate prescribed in 28 U.S.C. § 1961. Sea Hawk took the view that the circumstances of this case entitle it to a higher rate of interest than that prescribed in 28 U.S.C. § 1961. The parties stipulated that Sea Hawk could move for a determination of the appropriate

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[6] Stipulated Notice and [Proposed] Order re Status of Settlement Negotiations and Agreement to seek the Court's Determination of Prejudgment Interest, Clerk's Docket No. 8015.

[7] Clerk's Docket No. 6466. A copy of Order No. 299 is attached as Exhibit A to Exxon's Memorandum of Points and Authorities in Opposition to Sea Hawk Seafoods' Motion to Depart from Order No. 299, Clerk's Docket No. 8055.

rate of interest.[8] The court approved the parties' stipulation on September 29, 2004.[9]

Order No. 299 decided a motion by the fishermen plaintiffs filed after the jury awarded them $287 million in compensatory damages in Phase IIA of the *Exxon Valdez* trial. In Order No. 299, which was entered on September 21, 1995, the court first concluded that the fishermen were entitled to prejudgment interest. The court then considered what the appropriate rate of interest should be. The court cited the general rule regarding prejudgment interest in admiralty cases, which is that "'the measure of interest rates prescribed for postjudgment interest in 28 U.S.C. § 1961(a) is also appropriate for fixing the rate of prejudgment interest unless the equities of a particular case demand a different rate.'"[10] The fishermen argued that the equities of the case required that the court award prejudgment interest at the rate provided in AS 09.30.070 and AS 45.45.010, which was then set at 10.5%. The court rejected the fishermen's arguments as to why the Alaska state statutory rate should

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[8] Sea Hawk raised the issue of whether prejudgment interest should be compounded annually. Exxon states that it has voluntarily agreed to compound the interest annually. *See* Memorandum of Points and Authorities in Opposition to Sea Hawk Seafoods' Motion to Depart from Order No. 299 at 23, Clerk's Docket No. 8055.

[9] Clerk's Docket No. 8015.

[10] Order No. 299 at 4 (quoting *Columbia Brick Works, Inc. v. Royal Ins. Co.*, 768 F.2d 1066, 1071 (9th Cir.1985)), Clerk's Docket No. 6466.

apply, and concluded "that the prejudgment interest rate in the case at bar will be fixed according to 28 U.S.C. § 1961."[11]

Here, the parties agree that Sea Hawk is entitled to prejudgment interest. The parties also agree that prejudgment interest will accrue from July 1, 1992, for Sea Hawk's 1992 losses and July 1, 1993, for Sea Hawk's 1993 losses. The only issue before the court is the appropriate rate of prejudgment interest.

Discussion

Exxon contends that Order No. 299 is the law of the case and thus the proper rate of prejudgment interest is that established in Order No. 299. " 'Under the "law of the case" doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." ' *United States v. Smith,* 389 F.3d 944, 948 (9th Cir.2004) (quoting *Richardson v. United States,* 841 F.2d 993, 996 (9th Cir.1988)). "The doctrine is a judicial invention designed to aid in the efficient operation of court affairs and is founded upon the sound public policy that litigation must come to an end[.]" *Id.* (internal quotations and citations omitted). "[T]he doctrine serves to advance the 'principle that in order to maintain consistency during the course of a single lawsuit, reconsideration of legal

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[11] *Id.* at 7.

questions previously decided should be avoided."' *Id.* at 948 (quoting *United States v. Houser,* 804 F.2d 565, 567 (9th Cir.1986)).

The court need not decide whether Order No. 299 is the law of the case or, if it is, whether any exceptions to the law of the case doctrine apply. All the court did in Order No. 299 was apply the Ninth Circuit federal admiralty rule regarding prejudgment interest to the fishermen plaintiffs, after having first determined that the fishermen plaintiffs were entitled to prejudgment interest. In *Western Pacific Fisheries, Inc. v. SS President Grant,* 730 F.2d 1280, 1289 (9th Cir.1984), the Ninth Circuit held:

> that the measure of interest rates prescribed for post-judgment interest in 28 U.S.C. § 1961(a) is also appropriate for fixing the rate for pre-judgment interest in cases such as this, where pre-judgment interest may be awarded, unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate.

The court is bound to apply this same rule to Sea Hawk, regardless of whether Order No. 299 is the law of the case or not.

The court is mindful of the fact that Sea Hawk's claims are based on state law, but after consideration of *Columbia Brick Works,* 768 F.2d 1066, the court is convinced that federal admiralty law applies to the prejudgment interest issue currently before it. In *Columbia Brick,* the Ninth Circuit Court of Appeals

considered whether a state statute or the federal admiralty rule of *Western Pacific Fisheries* should govern the rate of prejudgment interest. Columbia had received equipment that was damaged in transit from Spain. The equipment was insured against such damage by the defendant, Royal Insurance, under an all-risk marine insurance policy. Columbia brought a diversity action in federal district court in Oregon. After the jury awarded Columbia $850,000 in damages, the district court, upon a motion by Columbia, awarded Columbia prejudgment interest at a rate of 12.801%, a rate based on 28 U.S.C. § 1961. *Id.* at 1068. One of the issues on appeal was whether the district court erred by applying the federal prejudgment interest rate rather than the state statutory prejudgment interest rate. Royal argued that the Oregon state statutory rate should apply because Columbia brought its suit under the district court's diversity jurisdiction.[12] Columbia argued that because the case involved maritime issues, federal law should apply.

The court of appeals first observed that "[i]n diversity cases, admiralty issues are generally covered by maritime law." *Id.* at 1071. The court continued: "[i]n cases tried under admiralty principles only,

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[12] The general rule in the Ninth Circuit is that "'[i]n diversity actions, state law determines the rate of pre-judgment interest. . . .'" *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1107 (9th Cir.1998) (quoting *AT & T Co. v. United Computer Systems, Inc.*, 98 F.3d 1206, 1209 (9th Cir.1996)).

principles of federal law govern a plaintiff's entitlement to prejudgment interest even though the plaintiff may have invoked diversity jurisdiction in his complaint." *Id.* The court further noted that "state law will control issues related to maritime insurance policies 'in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice."' *Id.* (quoting *Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d 506, 510 (9th Cir.1984)). The court held that the district court did not abuse its discretion in applying the federal prejudgment interest rate because *Western Pacific Fisheries* established that 28 U.S.C. § 1961 should govern prejudgment interest in admiralty cases unless the equities of the case demand a different rate.

This court reads *Columbia Brick* to stand for the proposition that even if the plaintiff invoked the court's diversity jurisdiction and even if the claims involved in the case are governed by state law, federal admiralty law governs the prejudgment interest question as long as the issues involved are "admiralty issues". In *Columbia Brick,* the court was sitting in diversity jurisdiction and the implication is that the claims, which involved a marine insurance policy, were governed by Oregon law, not admiralty law.[13]

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[13] The court never states what law governed Columbia's substantive claims, but one can infer from the court's reference to marine insurance policies being governed by state law that such was the case.

Nonetheless, the court applied admiralty law to the prejudgment interest question.

Applying *Columbia Brick* to the instant case, it must first be noted that the court is not sitting in diversity jurisdiction. Sea Hawk did not invoke the court's diversity jurisdiction in its federal complaint, nor did Exxon invoke the court's diversity jurisdiction when removing Sea Hawk's state court complaint to this court. But even if Sea Hawk or Exxon had invoked the court's diversity jurisdiction (which presumably could have been done), under *Columbia Brick,* as long as the case involves "admiralty issues" or "admiralty principles", admiralty law governs the prejudgment interest question regardless of whether state law governs the claims themselves. It is established in the Ninth Circuit that "'admiralty courts may recognize and enforce rights and obligations created by state law"' if the "state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system." *Pacific Merchant Shipping Ass'n v. Aubry,* 918 F.2d 1409, 1422 & n. 17 (9th Cir.1990) (quoting *Sewell v. M/V Point Barrow,* 556 F.Supp. 168, 169 (D.Alaska 1983)). In this instance, the Ninth Circuit has already determined that Sea Hawk's state law claims are not preempted by admiralty law. In sum, what matters here is not that the claims are governed by state law, but whether the case involves "admiralty issues" or "admiralty principles."

As to that issue, this court has already determined that the grounding of the *Exxon Valdez* was a

maritime tort. *See In re Exxon Valdez,* 767 F.Supp. 1509, 1511-12 (D.Alaska 1991). The nature of the tort does not change merely because Sea Hawk's claims are based on state law. Thus, under *Columbia Brick,* federal law, not state law, governs the prejudgment interest question, even though Sea Hawk's claims themselves are governed by state law. The judicially fashioned admiralty rule governing prejudgment interest is that the rate prescribed by 28 U.S.C. § 1961(a) applies unless the equities of the case demand otherwise.

Before considering whether the equities of the case between Sea Hawk and Exxon demand a rate other than that prescribed in Section 1961(a), the court must determine what the prejudgment interest rate would be under Section 1961(a). In the briefing on the instant motion, Sea Hawk refers to a rate of 2.60%, the prevailing federal rate on the day it filed the instant motion. Exxon refers to a rate of 2.47%, the prevailing federal rate on the day Exxon contends the settlement was reached. In its order setting oral argument on the instant motion, the court suggested to the parties that neither of these dates were the correct dates to look to for purposes of setting the prejudgement interest rate, and the parties' arguments at oral argument were devoted primarily to this issue.

Section 1961(a) provides that the appropriate rate for post-judgment interest is based on the weekly average one-year constant maturity Treasury yield rate that exists "for the calendar week preceding the

date of the judgment." 28 U.S.C. § 1961(a). Section 1961(a) is silent as to what date the court looks to in determining the appropriate rate of prejudgment interest. The Ninth Circuit has considered this issue several times but has never established a bright-line rule as to what date the district court should look to in setting a prejudgment interest rate.

In *Blanton v. Anzalone,* 760 F.2d 989, 992-93 (9th Cir.1985), the Ninth Circuit held that the appropriate rate of prejudgment interest is the one in effect immediately prior to the defendant's wrongful conduct. *Blanton* was an ERISA case that involved a breach of fiduciary duty claim by a beneficiary of an ERISA plan. The plan owned a building that the trustees of the plan rented to themselves at a rate far below the fair market rental value, which the court determined was a breach of their fiduciary duty. The court held that the beneficiary was entitled to prejudgment interest on the damages for the breach of fiduciary duty claim based on the *Western Pacific Fisheries* rule. In remanding the case to the district court, the court of appeals instructed the district court to calculate prejudgment interest:

> by applying, to each monthly rental undercharge, interest from the date of the undercharge to the date of the original judgment *"at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled*

> *immediately prior to the date" of the undercharge.*

Id. at 993 (quoting 28 U.S.C. § 1961(a)(1982)) (emphasis added).

In *United States v. Gordon,* 393 F.3d 1044, 1058 n. 12 (9th Cir.2004), which involved a challenge to a criminal restitution order, the Ninth Circuit confirmed that in *Blanton* it had held that "the applicable prejudgment interest rate is the one in effect immediately *prior* to the date of the wrongful conduct which caused a plaintiff's loss." *United States v. Gordon,* 393 F.3d 1044, 1058 n. 12 (9th Cir.2004). Interestingly, in *Gordon,* the district court had used two different methods for calculating the rate of prejudgment interest. For one set of losses, the district court used the rate in effect on the date of the defendant's wrongful conduct. *Id.* at 1058. For another set of losses, the district court used the rate in effect on the date the defendant's victim actually incurred the loss. *Id.* The court of appeals reversed as to the first set of losses for reasons other than the rate of interest that had been applied and affirmed as to the second set of losses. *Id.* at 1059-60.

In *Saavedra v. Korean Air Lines Co.,* 93 F.3d 547, 551 (9th Cir.1996), the court held that "given the alternatives presented to the district court, it did not abuse its discretion in awarding prejudgment interest at the 52 week T-Bill rate as of the last T-Bill auction prior to judgment." The options that the district court had been presented with were to use the rate in effect

prior to the judgment or to use the rate in effect immediately prior to the Korean Air Lines crash that had caused the losses at issue in the case. *Id.* at 555. The court observed that "[t]he most accurate way to fully compensate a plaintiff would be to award prejudgment interest from the date of injury, but at a fluctuating rate." *Id.* However, the court found that the district court had not been presented with this option. *Id.* The court stated that "Saavedra argued for [the] T-Bill rate just before the time of injury, while KAL argued for the T-Bill rate just before the time of judgment." *Id.* No one had apparently suggested that a fluctuating rate be used. The court reasoned that it was not an abuse of discretion for the district court to use the date of judgment because that is the date set forth in Section 1961(a). *Id.* In *In re Nucorp Energy, Inc.*, 902 F.2d 729, 734 (9th Cir.1990), the Ninth Circuit also indicated that using the date of judgment might be appropriate because that is the date set forth in Section 1961(a). There, the court of appeals remanded to the district court to determine the appropriate rate of interest because the district court had used a rate that was neither based on the date of judgment nor on the date of injury.

Thus, we are left with two cases from the Ninth Circuit in which the court directs that the appropriate prejudgment interest rate is that which is in effect immediately prior to the defendant's wrongful conduct, and two cases in which the court approved

as appropriate the prejudgment interest rate in effect immediately prior to the date of judgment.[14] The matter is further complicated by the court of appeals' suggestion in dicta in *Saavedra* that the most accurate date to use for prejudgment interest purposes would be the date of injury, which may or may not be the same as the date of the defendant's wrongful conduct. *Saavedra,* 93 F.3d at 555.

Assessing prejudgment interest is within the district court's discretion. *Id.* That discretion extends to determining what date to use to determine the rate of prejudgment interest. *Id.* Because there is no clear precedent from the Ninth Circuit, it is within the court's discretion to decide which of the several options should apply here.

"The rationale behind awarding prejudgment interest in admiralty cases is to compensate the wronged party for being deprived of the monetary value of the loss from the time of the loss to the payment of judgment." *Vance v. American Hawaii Cruises, Inc.,* 789 F.2d 790, 794 (9th Cir.1986). This purpose would best be served in this case by awarding prejudgment interest based on the rate in effect immediately prior to the date of Sea Hawk's actual losses, or, in other words, the rate in effect immediately prior to the date

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[14] As everyone recognizes, we have a settlement here, not a judgment. If the appropriate rate is the one in effect on the date of judgment, it follows that, in this instance, the appropriate rate would be the one in effect on the date of settlement.

of injury. This is not a case, like *Blanton,* where the plaintiff's injury occurred on the same date as the defendants' wrongful conduct. Here, the defendants' wrongful conduct occurred several years before the injuries or losses in question. When a defendant's wrongful conduct has caused injuries or losses to occur at different times over a period of years, the most accurate way to fully compensate the plaintiff for its losses is to use the rate in effect immediately prior to the losses. In such a situation, the date of loss, as opposed to the date of wrongful conduct, becomes the more relevant date. Similarly, when the date of settlement is many years after the date of the plaintiff's loss or injury, the plaintiff may not be fully compensated or might even be overcompensated if the date of settlement is used to calculate the rate of prejudgment interest. Again, the date of loss or injury becomes the more relevant date. Therefore, in this instance, the prejudgment interest rate in effect immediately prior to the dates of Sea Hawk's losses should control. The parties have agreed on two "injury" or "loss" dates, July 1, 1992, and July 1, 1993. The federal prejudgment interest rate in effect immediately prior to July 1, 1992, was 4.11%. The federal prejudgment interest rate in effect immediately prior to July 1, 1993, was 3.54%.

Exxon argues that awarding Sea Hawk prejudgment interest at a rate other than the one in effect immediately prior to the date of settlement is unfair to other plaintiffs whose prejudgment interest rate has been based on the date of settlement. The court

perceives no unfairness here. The other plaintiffs to which Exxon refers agreed to calculate prejudgment interest based on the rate in effect on the date of settlement. No one questioned the rate of prejudgment interest that was being applied and, in approving the settlements, the court had no reason to find the rate of prejudgment interest unfair. Here, Sea Hawk, as it is entitled to do, has raised a question as to what the appropriate rate should be and the parties agreed to let the court determine the appropriate rate. The other parties which settled could have questioned the rate of prejudgment interest and sought a court determination as well. There is nothing unfair about Sea Hawk being awarded prejudgment interest at a higher rate than that to which other parties agreed as part of their settlements with Exxon.

The court turns then to the issue of whether the equities of this case demand a rate other than the federal rate that prevailed immediately prior to Sea Hawk's injuries or losses. There must be substantial evidence to support a court's decision to depart from the Section 1961(a) rate. *Blanton v. Anzalone,* 813 F.2d 1574, 1576 (9th Cir.1987). "'Substantial evidence' has been defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1014 (9th Cir.1985)).

Sea Hawk argues that the equities of this case demand a higher rate, although it bears mentioning

that Sea Hawk's arguments on this issue were advanced when the parties believed that the prevailing federal prejudgment rate was well under 3%. Sea Hawk points out that it is well-established that "[t]he essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 195 (1995). Another purpose of prejudgment interest, according to Sea Hawk, is to discourage delay in litigation by a defendant. *See, e.g., Sea-Land Service, Inc. v. Eagle Terminal Tankers, Inc.*, 443 F.Supp. 532, 534 (D.Wash.1977). Sea Hawk contends that neither of these two purposes would be met here if the federal interest rate were applied.

Sea Hawk argues that it will not be fully compensated if it is subjected to a prejudgment interest rate of 2.6%. This might have been true had the court, in its discretion, decided that the interest rate should be set based on the rate in effect immediately prior to settlement. But that is not what has happened here. The court, in its discretion, has determined that the appropriate rate of prejudgment interest is the one in effect immediately prior to the date of Sea Hawk's actual losses. Sea Hawk will be fully compensated for its losses under such a scenario. Using the "date of injury" rates will restore Sea Hawk to its pre-injury position, which is the purpose of awarding prejudgment interest.

Sea Hawk then suggests that it will not be fully compensated if one considers that Exxon's average

rate of return during the years it held Sea Hawk's money was 29.32% and that Sea Hawk could have earned a return of 18.34% on its investments during those same years. As to Exxon's rate of return, Sea Hawk acknowledges that the court rejected a similar argument by the fishermen in Order No. 299. In Order No. 299, the court concluded that the fact that Exxon "may have earned greater interest through internal investments than Treasury Bills earned over the same period [did] not create the type of inequitable situation which would warrant deviating"[15] from the Section 1961(a) interest rate. Sea Hawk argues that its situation is different from that of the fishermen because its claims are solely for violation of Alaska law, whereas the fishermen's claims were based on federal admiralty law. This argument fails because, as discussed above, federal admiralty law governs the prejudgment interest issue despite the fact that Sea Hawk's claims are based on state law. Sea Hawk's situation, at least as to prejudgment interest, is not any different than the fishermen's. Exxon's rate of return on its internal investments does not require a departure from the Section 1961(a) prejudgment interest rate.

As to Sea Hawk's rate of return, the 18.34% rate advanced by Sea Hawk is, at best, speculation. In his declaration, Mr. Bertoson, Sea Hawk's current president, states that "this rate of 18.34% is a fair proxy in

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[15] Order No. 299 at 5, Clerk's Docket No. 6466.

light of the impossibility of being able to know with absolute certainty what the future would have been had [the oil spill] not happened."[16] The court can only depart from Section 1961(a) if there is substantial evidence to support such a departure. Mr. Bertoson's testimony does not constitute substantial evidence and cannot support a departure from Section 1961(a).

Sea Hawk also argues that using the federal rate for prejudgment interest will encourage litigation delay because defendants will drag out litigation in hopes that the interest rate will go down, as has happened here. Sea Hawk points out that the fishermen were awarded prejudgment interest on the Phase IIA jury verdict at a rate of 5.64%, but that Sea Hawk is being asked to accept a rate that is less than half that simply because this case has taken so long. Sea Hawk argues that applying the Section 1961(a) interest rate in this instance will allow delay to work to Exxon's economic advantage.

This case has gone on for a long time, but that is not solely Exxon's fault. Even if it were, Exxon is paying for the delay. Exxon will have to pay prejudgment interest for almost 13 years for the 1992 losses and almost 12 years for the 1993 losses. The equities of the case do not demand that Exxon also be made to

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[16] Declaration of Terry Bertoson at 3, ¶ 6, attached to Sea Hawk Seafoods' Motion to Determine Rate of Prejudgment Interest for Final Settlement Purposes, Clerk's Docket No. 8042A.

pay at a rate higher than that prescribed by Section 1961(a).

Conclusion

Plaintiff Sea Hawk Seafoods' motion for a determination that it be awarded prejudgment interest for its settlement with Exxon at a rate somewhere between 9.20% to 29.32% per annum, compounded annually, is granted in part and denied in part. The parties have agreed that prejudgment interest will be compounded annually; so, the motion is granted as to that issue. The motion is denied as to the appropriate rate of interest being between 9.20% and 29.32%.

The rate of prejudgment interest that shall apply to the settlement between Sea Hawk and Exxon is 4.11% for the 1992 losses and 3.54% for the 1993 losses.

UNITED STATES DISTRICT COURT
FOR THE NINTH CIRCUIT

In re: EXXON VALDEZ,	No. 07-35806
SEA HAWK SEAFOODS, INC., Plaintiff-Appellant, v. EXXON MOBIL CORP; EXXON SHIPPING CO., Defendants-Appellees.	D.C. No. CV-89-00095-HRH District of Alaska, Anchorage ORDER (Filed Mar. 25, 2009)

Before: FISHER, BERZON and BYBEE, Circuit Judges.

Judges Berzon and Bybee have voted to deny appellant's petition for panel rehearing. Judge Fisher would grant the petition. Appellant's petition for rehearing, filed January 6, 2009, is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:	)
	)
the EXXON VALDEZ.	)
This Document Relates to	) No. 3:89-cv-0095-HRH
	)
SEA HAWK SEAFOODS, INC.	)

DECLARATION OF KEVIN P. SULLIVAN IN SUPPORT OF PLAINTIFF SEA HAWK SEAFOODS, INC.'S MOTION FOR ENTRY OF AMENDED FINAL JUDGMENT

I, KEVIN P. SULLIVAN make the below statements under penalty of perjury, am competent to testify to these statements, and make these statements on my own personal belief. I am one of the attorneys for plaintiff Sea Hawk Seafoods, Inc.

1. Attached hereto as Exhibit A is the Ninth Circuit Opinion in *Sea Hawk SeaFoods, Inc. v. Exxon Corp.*, ___ F.3d ___, 2007 WL 1112677 (9th Cir. 2007).

2. Attached hereto as Exhibit B is the United States District Court for the District of Alaska, *In re Exxon Valdez.*, Order 369.

3. Attached hereto as Exhibit C is Exxon's *Memorandum in Opposition to Sea Hawk's Motion to Depart. from Order No. 299*, dated Jan. 21, 2005.

4. Attached hereto as Exhibit D is the letter from Charles Diamond to John Young dated April 20, 2005.

5. Attached hereto as Exhibit E is Joint Answering Brief of Appellees (pp. 18, 24).

6. Attached hereto as Exhibit F is the February 7, 2007 Partial Transcript of Oral Argument.

7. Attached hereto as Exhibit G is Alaska statute AS 9.30.070(a), (b) (1996).

EXECUTED at Seattle, Washington, this 17th day of May, 2007.

/s/ Kevin P. Sullivan
KEVIN P. SULLIVAN

EXHIBIT D

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April 20, 2005

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Via Facsimile and First Class Mail

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Re: *Sea Hawk v Exxon*

Dear John:

I write to seek your agreement respecting the computation of interest pursuant to Judge Holland's order of last week.

The parties agreed to settle this matter for a total of $2,146,908, representing damages of $1,616,550 for 1992 and $530,358 for 1993, with interest accruing from July 1 of each year through the date of payment. The parties also agreed that prejudgment interest will be compounded annually.

Last week the Court directed that we use rates of 4.11% for the 1992 damages and 3.54% for 1993 damages. These rates provide an interest figure of $1,097,317.08 for 1992 damages and $270,928.61 for 1993 damages, compounded through May 1, 2005, for a total settlement of $5,515,153.69. Offset by the $2,889,707.63 already paid, ExxonMobile owes Sea Hawk $625,446.06.

If Sea Hawk agrees with the foregoing, then please confirm the same by countersigning in the space provided below and fax the confirmation back to me. Upon receipt of your confirmation, I will seek immediate payment of the above-referenced $625,446.06. Thereafter, dismissal with prejudice of all of Sea Hawk's claims against Exxon shall be entered as per the parties' agreement.

As a reminder, the Court asked that the parties submit their closing papers on these claims on or before May 5, 2005.

Sincerely,

/s/ Charles P. Diamond
Charles P. Diamond

CPD:cbp

Agreed:

/s/ John G. Young
John G. Young, Esq.
on behalf of Plaintiff Sea
Hawk Seafoods, Inc.

EXHIBIT E

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[18] never was a circumstance where Alaska would have applied a 10.5% interest rate to the situation presented here, where interest is to be *compounded*. The Alaska statute was clear that its provision was for 10.5% *simple* interest. *See Alyeska Pipeline Service Company v. Anderson*, 669 P.2d 956, 956 (Alaska 1983) (section 09.30.070 "does not provide for compound interest on judgments"); *State v. Doyle*, 735 P.2d 733, 742 (Alaska 1987) (the 10.5% prejudgment interest rate is not meant to be compounded).[9]

---

[9] That fact is, of course, the short answer to Sea Hawk's argument that the district court erred by not applying "the whole of State law." AB 10-11. In fact, Sea Hawk never asked the district court to apply the "whole" of state law: it asked it to incorporate an Alaska statute providing for simple interest *only* into a settlement where interest is to be *compounded*.

In any event, Sea Hawk's theory that "the whole of state law" must always be applied if state law governs any aspect of a maritime claim is fictional. Sea Hawk points only to a casual dictum in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), which held that *federal* law must be fully enforced by maritime courts and to three cases derived from the Supreme Court's tortured history with wrongful death, all three of which were expressly limited to the subject of wrongful death, and none of which is any longer good law. *See Moragne v. States Marine Lines*, 398 U.S. 375, 378 (1970). Wrongful death is a special case in admiralty. See *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206-15 (1996). Each of the cases, moreover, acknowledges that state law may not be applied so as to be "destructive of the uniformity of federal maritime law," *The Tungus v. Skovgaard*, 358 U.S. 588, 594 (1959); *see Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921); *Hess v. United States*, 361 U.S. 314, 320 (1960). The point of *Western Pacific* and *Columbia Brick Works* is that the uniformity of maritime law requires a maritime rule for prejudgment interest. 730

* * *

[24] Dated: December 5, 2005.

Respectfully submitted,

JOHN E. DAUM
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Attorneys for Defendant-Appellee Exxon Mobil Corporation

and

DOUGLAS J. SERDAHELY
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Attorneys for Defendant-Appellee Exxon Shipping Company

By /s/ Victor Jih
Victor Jih

EXHIBIT F

[44] Sea Hawk Seafoods, Inc. v. Exxon Corp., et. al., Ninth Circuit #05-35468 2-7-07 Oral Argument Excerpts Simple vs. Compound Interest Issue (Transcribed from download off Ninth Circuit website)

Appellant:

Judge Graber: . . . If we were to agree with your legal argument that State law governs the pre-judgment interest rate, would we remand to the District Court to determine what that is, or would we do it ourselves, or what would be the outcome?

Schein: Your honor, there was some challenge by Exxon about that rate in the lower court papers in this motion, and they did not make any challenge about the actual rate on appeal, so I would say that issue is gone. There is really no question; 10½% was the rate set by Alaska 9.30, I forget the exact section but it's in the brief; and that section was later amended, in 1997 I believe it was, and the act that amended it said very clearly, this only applies for causes of action arising after a date, it was a date in 1997. And the AK legislature knew what it was doing there; it has been very careful not to go back and affect causes of action arising out of the Exxon Valdez oil spill, so cases in Alaska that we've cited have then held, look, that change only applies afterwards. So I think it is rock solid law that 10½% applies.

Judge (unknown): And that's the rate you asked for under Alaska law.

Schein: That's correct. There is a wrinkle on this, and that's the question of compounded interest versus simple interest. And our position, as we've put forth in the brief, is that Exxon voluntarily stipulated to compound interest, and that it's bound by that. And you'll find that at Sea Hawk Supplemental Excerpt of Record, page 8, in the footnote, which is a brief by Exxon submitted in the Motion papers below. We had presented to the Court the question of whether it should be compound or simple; Exxon said, "we already agreed to pay compound, it's not an issue." So that issue as far as I'm concerned has been removed from the case by stipulation.

Judge Graber: We'll see what opposing counsel thinks, assuming the thing they don't want to assume, what would be the rate, and how would it be applied.

* * *

Appellees:

Daum: . . . We entered into a settlement with Sea Hawk, under which we paid them the principal amount of those damages, but the parties could not agree as to the proper interest rate. So that settlement provided, consistent with 28 USC § 1961, for the court to fix the interest rate, which [45] would be compounded. Now Sea Hawk didn't tell us at that time just what it was asking for, and in fact when it came into court to talk about the interest rate, it asked for a variety of different interest rates; its own supposed borrowing costs, the Alaska Statute,

Exxon's supposed profit from the transaction; but the fact is that the answer to the question about simple versus compound interest is that the application of the Alaska statute to this case, by its own terms, is not possible, because the stipulation provides for interest to be compounded, the Alaska statute provides for simple interest. And the reason that the stipulation provided for compound interest –

Judge (unknown): Well they weren't stipulating to applying Federal interest, were they?

Daum: Pardon?

Judge (unknown): That doesn't mean they were stipulating to applying the Federal rule, does it?

Daum: I don't know what they were stipulating to on their side, Your Honor, on our side –

Judge (unknown): Was the District Court required to decide whether Alaska or Federal law applied?

Daum: Ah, yes, as Sea Hawk presented its case to the District Court, it was.

Judge (unknown): So why couldn't the parties stipulate, in a settlement agreement, that even if Alaska law applied, that they would apply – that it would be compounded?

Daum: The parties could have stipulated to that Your Honor; I don't think they did, or that that's the effect of the stipulation. This came against a background, where the precise question of what

interest should be paid in the Exxon Valdez cases, had already been litigated before Judge Holland. In Order 299, which dealt with the fishermen's claims, several – ah, many years before this controversy arose, Judge Holland found that 28 USC 1961 was the right measure for maritime cases, and applied it.

* * *

Judge Graber: . . . Is there any dispute between you as to what Alaska law is with respect to prejudgment interest, if it applies? Would the 10½% rate be the proper rate if we disagreed with your legal position?

Daum: The statute has been repealed, I think if you apply the statute, and the repealing clause, and if you leave aside the problem about simple versus compound interest, the Alaska rate is 10½% simple interest.

Judge Graber: And so, if we were to disagree with you on the law, what is your view about what should happen next? Would the case be more properly remanded to the District Court to consider all these questions about [46] compound versus simple and what the parties intended by that and so forth, or would we just do that here?

Daum: If it were merely a matter of compounding the interest rate – or, excuse me, if it were merely a matter of calculating the interest rate, I would think that the Court could either do it itself, or just indicate what the right answer was and leave it to the parties.

Given the simple versus compound interest question, which I think does involve some interpretation of the stipulation, that if the court came out in agreement with Sea Hawk on that issue then the appropriate result would be a remand so the effect of the stipulation could be taken into account.

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re: THE EXXON VALDEZ	Case No. A89-095 Civ (HRH) Consolidated
THIS DOCUMENT RELATES TO PLAINTIFF SEA HAWK SEAFOODS, INC. AND EXXON	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SEA HAWK SEAFOODS' MOTION TO DEPART FROM ORDER NO. 299.

(Filed Jan. 21, 2005)

I. INTRODUCTION.

In Order No. 299 the Court followed what it characterized as "established Ninth Circuit admiralty law" (at 5, citing *Columbia Brick Works, Inc. v. Royal Ins. Co.,* 768 F.2d 1066 (9th Cir 1985)) and fixed prejudgment interest in favor of the *Exxon Valdez* including "law of the case," the Court should not treat Sea Hawk differently and should not depart from Order 299:

- Contrary to Sea Hawk's claim, federal law controls. Ninth Circuit law is clear that regardless of the availability of a state law remedy for a maritime tort, where national uniformity is required, federal admiralty rules prevail; and prejudgment interest is an area requiring national uniformity. The federal admiralty rule requires the use of the rate prescribed by §1961 other than in exceptional circumstances. That Alaska might prescribe a higher rate of prejudgment interest for state court judgments (which, in fact, it does not) is thus besides the point.

- Applying the test of *Columbia Brick Works,* Sea Hawk has not demonstrated that the "equities" of this case, any more than the cases that preceded it, justify using a rate

> different than that prescribed by § 1961. It is irrelevant that Exxon's internal rate of return may have exceeded the current federal funds rate because prejudgment interest is awarded to compensate the plaintiff, not to punish the defendant by depriving it of gains it purportedly might have earned at the plaintiff's expense. Further, in Order 299 this Court rejected the claim that Exxon should pay interest at rates actually incurred by plaintiffs on indebtedness incurred (or not retired) because of the spill. As to the fisherman, the Court viewed the claim as inherently speculative and the approach as leading to a potential profusion of interest rates dependent on personal situations. Those considerations are equally apt here, particularly the discomfort with speculative claims. Sea Hawk offers only its controlling shareholder's speculative *ipse dixit* to suggest that it would have used its lost profits to
>
> * * *

interest in a SEC action); *Golden State Transit Corp. v. City of Los Angeles,* 773 F. Supp. 204, 210 (C.D. Cal. 1991) (following *Western Pacific* in awarding prejudgment interest for a Section 1983 labor claim).

IV. PREJUDGMENT INTEREST IN THIS CASE IS GOVERNED BY FEDERAL MARITIME PRINCIPLES, NOT STATE LAW.

As this Court recognized in *In re Glacier Bay,* 746 F. Supp. 1379 (D. Alaska 1990), claims involving

maritime torts are governed by federal admiralty principles, regardless of whether a claim arises under state statute, federal statute or common law, and regardless of whether the claim originated in a state court, not federal one. Said the Court:

> Plaintiffs' position that maritime law does not apply because admiralty jurisdiction was not invoked is not supported in the law. The oil spill involved here constitutes a maritime tort because it occurred on navigable waters and bears a significant relationship to traditional maritime activity. . . . The substantive law applicable to a maritime tort is the general maritime law. . . . The same principles would govern the outcome had this case remained in state court where it was originally filed or had this court's admiralty jurisdiction been invoked.

Id. at 1383.

Federal rules take precedence, even in maritime tort claims originally filed in state court under state law, because of the need for uniformity. In *Columbia Brick Works,* the Ninth Circuit found that uniformity demanded a single, federal maritime rule for prejudgment interest:

> [Defendant] contends that the Oregon rate should govern because there is no judicially-fashioned admiralty rule and no need for uniformity in admiralty practice regarding the rate of prejudgment interest. On the contrary, there is a judicially-fashioned admiralty rule governing the rate of prejudgment

> interest. In 1982, Congress amended 28 U.S.C. § 1961 to provide that district courts must set the interest accrued after civil judgment by reference to fifty-two week U.S. Treasury bill rates. We have determined that the measure of interest rates prescribed for postjudgment interest in 28 U.S.C. § 1961(a) is also appropriate for fixing the rate for prejudgment interest unless the equities of a particular case demand a different rate.

768 F.2d at 1071; *see also Sea-Land Service, Inc. v. Eagle Terminal Tankers, Inc.*, 443 F. Supp. 533, 534 (W.D. Wa. 1977) ("[I]n admiralty the rate of prejudgment interest . . . is not . . . bound by state law. The maritime law concerning 'restitutio in integrum' must be uniform and not vary with the local laws of different ports. . . . To be bound by the state prescribed rate of interest is to destroy uniformity.").

Sea Hawk contends that even in admiralty, federal courts can freely "determine a different rate should apply than that prescribed by § 1961." Mot. at 9. But in support, it cites the same out-of-circuit authority on which the Order 299 movants relied and which the Court rejected for being at odds with Ninth Circuit law (including *Mentor Ins. Co. v. Brannkasse*, 996 F.2d 506 (2d Cir. 1993); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992); *Zim Israel Navigation Co. v. Special Carriers, Inc.*, 800 F.2d 1392 (5th Cir. 1986); and *Todd Shipyards Corp. v. Auto Transportaiton, S.A.*, 763 F.2d 745 (5th Cir. 1985)). The only new authority Sea Hawk offers, *Collins v. Texaco, Inc.*, 607 So.2d 760 (La. App. 1992),

actually rejects the application of state prejudgment interest rules in admiralty: "[State law] provides a guideline rather than a mandatory standard for calculation of prejudgment interest in a case, such as the instant one, which was governed by federal rather than state law." *Id.* at 769.

Sea Hawk correctly observes that in *In re Exxon Valdez,* 270 F.3d 1215 (9th Cir. 2001), where the Ninth Circuit reinstated its claim, the Court held that maritime considerations did not require a uniform rule on the recovery of economic damages. It thus concluded that even a maritime tort plaintiff could pursue a claim for purely economic loss allowed under Alaska law that would otherwise be barred in admiralty. The federal rule gave way, the court reasoned, because it did not "originate[ ] in" admiralty, because application of the state law would not "interfere[ ] with the proper harmony and uniformity of maritime law," and because the state had a "great and legitimate" interest in protecting its waters and providing remedy for damages from the oil spill. *Id.* at 1251-52. Nothing in that decision suggests the Ninth Circuit intended to reverse its own decision in *Columbia Brick Works,* which found a need to adopt a uniform prejudgment interest practice and no justification for the state to enforce its own prejudgment rate.

In any event, the federal maritime rule as prescribed by the Ninth Circuit does not conflict with the Alaska rule. Alaska state law does ***not*** prescribe any prejudgment interest but merely sets a limit on

that which may be awarded. *See, e.g., State v. Carlson,* 65 P.3d 851, 874 (Alaska 2003) ("AS 45.45.010 merely sets the maximum rate of interest that may be charged."). Thus, the fact that this maritime claim arose under Alaska law is irrelevant if consideration of the equities justify the rate prescribed by 28 U.S.C. § 1961; for the same exact rate could be awarded under Alaska state law, so long as it did not exceed 10.5%. And we show next, even if law of the case did not preclude the relief Sea Hawk seeks (and it does), the very reasoning found in Order 299 provides that the equities of this case do not justify a different rate.

* * *

award of interest is not a penalty but compensation," and "fault for the delay between the injuring event and payment of consequential damages is irrelevant"); *see also id.* at 185 ("[I]n Alaska, we view interest on damage awards to be a form of compensation for the period that the plaintiff remains 'less than whole,' we do not consider responsibility for a delay of payment as a factor in making an interest award."). Hence, "[i]n the area of prejudgment interest the compensatory purpose of federal law is identical to that of state law." *Middle East Engineering & Dev. Co. v. Arkwright-Boston Mfrs. Mut. Ins.* Co., 675 F. Supp. 855, 857 (S.D.N.Y. 1987). As such, "there is no need to apply state law in order to vindicate the state's concern that plaintiffs be fully compensated for their losses." *Id.*

As to the second prong of Sea Hawk's argument, its sole basis for claiming Exxon "stonewall[ed] and delay[ed]" is the nine years that have passed since Order 299. Mot. At 11. Sea Hawk's claims, however, have only been pending for three years since the Ninth Circuit remand. Since that time the case has proceeded according to an agreed-upon trial schedule approved by this Court, which was vacated only after Sea Hawk sought to add another expert witness on the eve of trial. Thereafter, Sea Hawk's counsel became gravely ill, and the Court suspended motion practice and related activity after being "informally advised" of the parties' resulting informal agreement to continue deadlines and settlement discussions.

B. Sea Hawk Is Not Entitled to Pre-judgment Interest Measured By Its Pre-Spill Return on Capital.

Without citing any relevant authority, Sea Hawk next argues that the "equities" compel an award of prejudgment interest at 18.34% because it supposedly obtained that annual return on its investment during the six years prior to the spill. Thus, had Exxon promptly paid its damages, or had Sea Hawk avoided then entirely, Sea Hawk claims it

* * *

C. Alaska's Statutory Interest Rate Does Not Preempt The Rate Provided In Section 1961.

Sea Hawk next asks the Court to reconsider the "argument for use of the statutory state of Alaska rate – 10.5%." Mot. at 13-17. Putting aside that the Alaska statute sets a ceiling, not a rate (*see* discussion *infra* at p. 13), the Court appropriately rejected the argument when the fisherman made it,[11] holding instead that the Ninth Circuit provides "that the interest rate prescribed in section 1961 was appropriate for fixing prejudgment interest rates in admiralty cases." Order 299 at 7. Sea Hawk seeks to gain reconsideration by distinguishing its case from the fishermen's on the ground that unlike them, it "has only a claim under Alaska state law." Mot. at 13. But as discussed at length above, admiralty law – not Alaskan law – controls the issue of prejudgment interest because whatever the claims asserted, the oil spill constituted a maritime tort.

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[11] In the briefing of Order 299, plaintiffs argued the equities demanded the 10.5% statutory rate in light of the significantly lower short-term, risk-free investment rates then provided by the T-Bills – namely, 4.21% for 1992 losses and an even lower 3.43% for 1993 losses. Order 299 at 4-5.

D. Sea Hawk's Borrowing Rate Cannot Determine The Rate Of Prejudgment Interest.

Finally, Sea Hawk claims that "at a minimum" the "equities" demand that it receive interest sufficient to compensate it for its actual cost of borrowing money after the oil spill – namely, 9.20%, the rate it claims it paid National Bank of Alaska on its revolving line of credit. Mot. at 17-20; Bertoson Decl. ¶6(b). Once again, however, this precise "equity" was already rejected by the Court in Order 299 (at 6-7), when it refused to use the fishermen's actual borrowing rates as a prejudgment interest benchmark. They

* * *

proof that the spill caused Sea Hawk actually to incur avoidable interest expense anywhere approaching this sum, is to hand Sea Hawk an unprecedented EVOS windfall. Clearly, on this record, the "equities of the case" do not justify interest at higher than the § 1961 rate.

VI. Conclusion.

Exxon does not dispute Sea Hawk's right to an appropriate amount of interest on its settlement representing the time value of money. However, Sea Hawk has no right to interest at a large multiple of the rate paid to other *Exxon Valdez* claimants. Consistent with Order 299 and the uniform settlement practice in this case, the Court should fix the

rate at 2.47%,[15] the rate in effect when Exxon and Sea Hawk made their deal, but certainly no more than the federal funds rate in effect at the time of its loss, 4.11% for 1992 and 5.34% for 1993, with interest compounded annually which Exxon voluntarily has done.[16]

Respectfully submitted January 21, 2005.

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By /s/ [Illegible]
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[15] Sea Hawk contends agreement was not reached until an agreement was exchanged on December 1 by which time the federal rate had crept up to 2.6%. We respectfully disagree and attach the correspondence showing that all material terms had been negotiated by November 17, 2004. *See Ex. S* to LaPorte Aff.

[16] As Sea Hawk admits, it was – and is – within the Court's discretion whether interest should be compounded and, if so, on what basis. Mot. at 20. Nonetheless, Exxon voluntarily agreed to compound interest and factored that in to the computation of what it agreed to tender to Sea Hawk.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re: THE EXXON VALDEZ	
THIS DOCUMENT RELATES TO PLAINTIFF SEA HAWK SEAFOODS, INC. AND EXXON	Case No. A89-095 Civ (HRH) Consolidated

STIPULATED NOTICE AND [PROPOSED] ORDER RE STATUS OF SETTLEMENT NEGOTIATIONS AND AGREEMENTS TO SEEK THE COURT'S DETERMINATION OF PRE-JUDGMENT INTEREST

(Filed Sep. 27, 2004)

Pursuant to the Court's request for further information as to the status of the parties' settlement negotiations, they hereby submit the following stipulation.

WHEREAS, plaintiff Sea Hawk Seafoods, Inc. (Sea Hawk") and defendants Exxon Mobil Corporation (D-1) and Exxon Shipping Company (D-2) (collectively, the "Exxon Defendants") have engaged in serious and productive settlement discussions since March, 2004; and

WHEREAS, the parties have reached an agreement to settle Sea Hawk's compensatory damages claim but those discussions have stumbled over the issue of the rate of prejudgment interest that would apply were Sea Hawk to pursue its claim to a favorable judgment, with the Exxon Defendants taking the view that Order 299 directs the use of the federal interest rate as prescribed in 28 U.S.C. § 1961 and Sea Hawk contending that the circumstances of this case entitle it to a higher rate of interest; and

WHEREAS, the parties believe that the Court's guidance on this issue would be beneficial in bringing about a settlement of the matter;

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between counsel for the parties that Sea Hawk may move for determination of the appropriate rate of prejudgment interest on this settlement. This stipulation is without prejudice to the right of the Exxon Defendants to contend that Order 299 is final and conclusive and may not be reopened.

Dated at Anchorage, Alaska this 27th day of September, 2004.

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SUPREME COURT, U.S.
FILED
AUG 27 2009
OFFICE OF THE CLERK

No. 08-1562

IN THE
Supreme Court of the United States

SEA HAWK SEAFOODS, INC.,

Petitioner,

v.

EXXON MOBIL CORPORATION AND
EXXON SHIPPING COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole question properly presented is:

Where both the district court and the Ninth Circuit correctly stated this Court's "flexible" standard for judicial estoppel, *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001), whether the lower courts abused their discretion in applying that standard to the facts of this case?

RULE 29.6 STATEMENT

Respondent Exxon Mobil Corporation is a publicly held corporation, and no person or entity owns, directly or indirectly, 10% or more of its stock. Respondent Exxon Shipping Company is wholly owned, directly or indirectly, by Exxon Mobil Corporation.

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INTRODUCTION

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), this Court held that three "flexible" and non-exhaustive factors should inform the decision of whether to apply judicial estoppel in a given case. *Id.* at 750-51. The district court's judgment is a straightforward, factbound application of the principles enunciated in *New Hampshire*. Neither that judgment, nor the Ninth Circuit's affirmance of it, conflicts with any decision of this Court or implicates any circuit conflict. This case is, in short, a most unworthy candidate for certiorari. The Petition should be denied.

STATEMENT OF THE CASE

The underlying issue here is whether Respondents Exxon Mobil Corporation and Exxon Shipping Company (collectively, "Exxon") made an agreement to pay Petitioner compound prejudgment interest regardless of whether state law or federal law governed the rate of interest. Alaska law provides, as applicable here, that prejudgment interest is simple (at the rate of 10.5%) unless the parties have agreed otherwise. AS 09.30.070(a); Pet. App. 7-8. Petitioner claims that such an agreement was made. Exxon agrees that in prior judicial proceedings it acknowledged that interest could be compounded if *federal* law governed the rate of interest, *see* 28 U.S.C. § 1961(b), but denies that any agreement was made to pay compound interest if *state* law governed. The district court examined the record of the parties' negotiations, and, in a careful opinion, found as a fact that no agreement was made to pay compound interest in all circumstances. Pet. App. 8-14, 17-20.

The Ninth Circuit affirmed, on the ground that the district court's decision was "not clearly erroneous." Judge Graber dissented. Pet. App. 2, 3. Petitioner does not seek review of that purely state-law determination.

Instead, Petitioner argues that three "equivocal" statements, Pet. App. 17, give rise to a judicial estoppel, as a result of which Exxon should be held bound by an "agreement" that the district court has found Exxon never made. Pet. 6-7. The district court rejected Petitioner's judicial estoppel theory on the ground that: (1) Exxon had not taken inconsistent positions; (2) the court had never been misled about Exxon's position; and (3) there was no unfairness to Petitioner — the three factors that go to whether a judicial estoppel should be found under *New Hampshire v. Maine*. Pet. App. 14-16. The Ninth Circuit affirmed in a decision that was unanimous on the judicial estoppel point. Pet. App. 2-3. This Petition followed.

A. Factual Background

On March 24, 1989, the tanker EXXON VALDEZ ran aground in Prince William Sound, Alaska. Pet. App. 23. Exxon and Petitioner, a seafood processor, promptly resolved Petitioner's claims for loss of income in 1989, but could not agree as to whether Petitioner was entitled to damages in subsequent years. After years of litigation, *see In re the Exxon Valdez*, 270 F.3d 1215, 1250-53 (9th Cir. 2001), the parties were able to agree on the amount of damages Petitioner had suffered, but still could not agree on how prejudgment interest on those damages should be calculated.

The parties' negotiations occurred against the background of a prior ruling by the district court (Order No. 299) to the effect that prejudgment interest would be governed by federal law, specifically 28 U.S.C. § 1961. *See* Pet. App. 30-31. Under that statute, the rate of interest is the "weekly average 1-year constant maturity Treasury yield," 28 U.S.C. § 1961(a), unless the district court determines otherwise based on the circumstances of the case. *See W. Pac. Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984). The statute expressly provides that interest "shall be compounded annually." 28 U.S.C. § 1961(b).

On September 27, 2004, the parties filed a stipulation with the district court advising that they had reached a negotiated settlement resolving all of Petitioner's outstanding claims for compensatory damages. Pet. App. 73-74. The stipulation also outlined the parties' disagreement over prejudgment interest: Exxon maintained that Order No. 299 mandated the use of the federal rate under 28 U.S.C. § 1961, while Petitioner insisted that it was entitled to a higher interest rate. *Id.* The parties stipulated that Petitioner "may move for determination of the appropriate rate of prejudgment interest on this settlement." *Id.* The stipulation did not address whether interest would be simple or compound. *Id.*

The parties memorialized their settlement agreement in a December 1, 2004 letter. Pet. App. 8. The letter recited that although the parties had agreed interest would be paid on the compensatory damages amount, "they have not agreed as to the appropriate interest rate or amount." *Id.* The settlement agreement, like the parties' stipulation and

the correspondence leading up to their settlement, was silent as to whether prejudgment interest would be simple or compound. Pet. App. 9.

Pursuant to the parties' agreement, Petitioner filed papers on the prejudgment interest issue, contending that a rate ranging from 29.32% to 9.20%, compounded annually, should apply to the settlement. Pet. App. 11, 27. Petitioner justified its request for compound interest not on the basis of any supposed agreement between the parties, but on the theory that 28 U.S.C. § 1961 gave the district court discretion to order compound interest, regardless of whether it determined that federal law or state law governed. Pet. App. 11.

In its responding papers, Exxon argued that Order No. 299 dictated the proper rate of prejudgment interest. Pet. App. 31. Exxon also agreed that it was within the court's discretion to decide whether interest should be compounded under 28 U.S.C. § 1961, and pointed out that in calculating the $742,799 in interest *already paid* to Petitioner (pursuant to Order No. 299), "Exxon voluntarily agreed to compound interest and factored that in to the computation of what it agreed to tender to Sea Hawk." Pet. App. 71 n.16. Exxon wrote:

> ***Consistent with Order 299 and the uniform settlement practice in this case***, the Court should fix the rate at 2.47%, the rate in effect when Exxon and Sea Hawk made their deal, but certainly no more than the federal funds rate in effect at the time of its loss, 4.11% for 1992 and 5.34% for 1993, ***with in-***

> ***terest compounded annually which Exxon voluntarily has done.***

Pet. App. 70-71 (emphasis added).[1]

On April 12, 2005, the district court ruled that 28 U.S.C. § 1961 governed prejudgment interest, concluding that federal law controlled the interest issue "despite the fact that Sea Hawk's claims are based on state law." Pet. App. 44. Noting that "Exxon states that it has voluntarily agreed to compound the interest annually," Pet. App. 30, the district court also held that "[t]he parties have agreed that prejudgment interest will be compounded annually; so, the motion is granted as to that issue," Pet. App. 46. In a subsequent order, the district court explained that, at the time of its April 12, 2005 ruling,

> the court did not believe that Exxon and Sea Hawk had an agreement as to compound interest if state law applied. Rather, it believed that Exxon had agreed to pay compound interest on the amount of prejudgment interest that it had already tendered to Sea Hawk, interest which had been calculated under federal law, which provides for compound interest. The court's reference to an "agreement" between the parties as to compound interest was a result of there being no *dis*agreement about compounding when the federal rate is employed, not the result of there being an *agree-*

---

[1] The Petition repeatedly cites this and similar language as if it represented an agreement by Exxon to pay compound interest, as distinct from a factual description of how Exxon had calculated interest already paid. As the district court pointed out, the two are quite different. Pet. App. 11-12.

> *ment* that prejudgment interest would be compounded even if state law applied. The court did not believe that [] Sea Hawk and Exxon had reached an overarching agreement as to compound interest.

Pet. App. 14 (emphasis in original).[2]

On appeal, Petitioner argued that the district court erred by using federal law instead of Alaska state law to set the rate of prejudgment interest. *See* Pet. App. 54. In response, Exxon pointed out that Petitioner was asking the court of appeals to apply Alaska law inconsistently because it was both seeking compound interest and asking the court to apply AS 09.30.070(a), which provides for simple interest only. *See id.* To amplify this point, Exxon wrote that Petitioner "never asked the district court to apply the 'whole' of state law: it asked it to incorporate an Alaska statute providing for simple interest only into a settlement where interest is to be compounded." Pet. App. 54 n.9.

At oral argument, Exxon's counsel reiterated the point about the inconsistency between Petitioner's seeking compound interest and the terms of the

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[2] The Petition several times quotes a single sentence from a letter between counsel dated April 20, 2005, Pet. App. 50-51, which was intended to implement the order of April 12, 2005. Pet. 3, 7, 17. Of course this letter can have no application whatever to the question of *judicial* estoppel, since it involves no statement made to a court, and was dated after the district court's ruling of April 12, 2005. In any event, as the district court pointed out, the sentence on which Sea Hawk relies is ripped out of its original context; in its proper context it does not have the meaning that Sea Hawk tries to give it. Pet. App. 19.

Alaska statute. He noted that "the application of the Alaska statute to this case, by its own terms, is not possible, because the stipulation provides for interest to be compounded, the Alaska statute provides for simple interest." Pet. App. 58. If there was any ambiguity in this statement, the ambiguity was promptly cleared up in response to a question from Judge Graber, as the district court noted, with an unequivocal statement of Exxon's position that it never agreed to compound interest in all circumstances. Pet. App. 16-17, 58-59.

The Ninth Circuit reversed the district court's ruling that federal law applied, holding that state law should control the interest payable on a judgment based on state law. *Sea Hawk Seafoods, Inc. v. Exxon Corp.*, 484 F.3d 1098, 1102-03 (9th Cir. 2007). The court of appeals did not decide whether interest should be simple or compound, and remanded for the district court to resolve that question. *Id.*

B. The Rulings On Judicial Estoppel Below

On remand, the district court vacated its prior order "as regards the rate of interest and calculation of interest," and ordered counsel to confer on an amended final judgment that calculated prejudgment interest pursuant to the Ninth Circuit's ruling. Pet. App. 6. Petitioner responded by filing a motion seeking an order that Exxon should pay compound prejudgment interest. *Id.* Petitioner argued that: (1) Exxon had agreed to pay compound interest no matter which law, federal or state, the district court found to apply; and (2) Exxon was judicially estopped by its previous statements to the district court and

the Ninth Circuit from denying that it had agreed to pay compound interest. Pet. App. 14-16, 18.

In a careful opinion, the district court examined the settlement agreement, the relevant correspondence leading up to and following the settlement, and the parties' prior statements made during the litigation. Pet. App. 8-20. Based on its review of this evidence, the district court concluded that "the parties never agreed that Exxon would pay compound interest regardless of whether state or federal law governed." Pet. App. 20.

Next, applying the factors set forth in *New Hampshire*, 532 U.S. at 750-51, the district court declined to find a judicial estoppel. Pet. App. 14-17. The district court held that Exxon's current position was not "clearly inconsistent" with its earlier position. Pet. App. 15. The reason, wrote the court, was that during the initial prejudgment interest phase of the litigation,

> [it] did not believe that Exxon had taken the position that it had an agreement with Sea Hawk that it would pay compound interest regardless of whether state or federal law applied. Rather, it was the court's perception that Exxon's position was that prejudgment interest would be compound if federal law applied. The position that Exxon now takes, that it never agreed to pay compound interest if state law applied, is not inconsistent with its earlier position.

Id.

The district court continued that even if Exxon had taken inconsistent positions, its acceptance of

Exxon's current position "would not create a perception that this court was previously misled." *Id.* In its reference to Exxon's "agreement" in its initial ruling on the prejudgment interest issue, the court wrote, "it did not believe that Exxon had agreed to pay compound interest even if state law applied." *Id.*

Finally, the district court held that Exxon had not gained an unfair advantage because both parties "have been given the opportunity to brief and argue the question of whether the parties had an agreement as to compound interest." Pet. App. 15-16.

Addressing Exxon's argument to the Ninth Circuit that Petitioner was asking for the incorporation of "an Alaska statute providing for simple interest only into a settlement where interest is to be compounded," the district court refused to find this to be an admission by Exxon that it had agreed to pay compound interest. Rather, the district court concluded that this statement was made in the context of Exxon's legal argument that compound interest and AS 09.30.070 are inconsistent. Pet. App. 16. Further, this legal argument was "entirely consistent with Exxon's argument that compound interest is not allowed under Alaska state law." *Id.*

Similarly, the district court ruled that the "equivocal" statements by Exxon's counsel at oral argument before the Ninth Circuit "provide no support for Sea Hawk's contention that Exxon represented to the court of appeals that it had agreed to pay compound interest if state law applied." Pet. App. 16-17.

The Ninth Circuit affirmed. The court of appeals first held that the district court's conclusion that the

parties did not agree to compounding, reached "[a]fter taking evidence and hearing arguments," was not clearly erroneous. Pet. App. 2. The court of appeals noted:

> Although a letter from Exxon to Sea Hawk stated in part that the parties "agreed that prejudgment interest will be compounded annually," that statement appeared in the context of a ruling by the district court that the federal interest rate applied. The remainder of the letter suggests that the parties made their entire agreement in the light of that ruling and, therefore, in the expectation that federal law governed.

Id.

The court of appeals also ruled that the district court did not abuse its discretion in declining to apply judicial estoppel against Exxon. *Id.* The court of appeals noted: "Although the [district] court recognized that Exxon had previously taken the position that it had voluntarily agreed to compound interest, the court understood the agreement to be limited to federal law. That is, the court was not misled." Pet. App. 2-3. In dissent, Judge Graber wrote that the district court "clearly erred in finding that the agreement to pay compound interest depended on application of the federal rate of interest." She did not, however, dissent from affirmance of the district court's refusal to invoke judicial estoppel. Pet. App. 3.

Petitioner's petition for panel rehearing was denied. Pet. App. 47.

REASONS FOR DENYING THE PETITION

The Petition purports to seek review so that this Court may address whether the application of judicial estoppel requires showings that: (1) "a litigant's previous inconsistent position was adopted or accepted by the court in which it was advanced," and (2) "a court was misled by the litigant's prior position." Pet. i. These Questions Presented reveal a basic misunderstanding of the decisions below. Neither the district court nor the Ninth Circuit passed on either of those questions. Instead, they both stated correctly the flexible principles of judicial estoppel enunciated by this Court in *New Hampshire v. Maine*, and then applied those principles to find that judicial estoppel should not be applied here. Those factbound rulings raise no issue that warrants review; and they implicate no conflicts in the circuits.

A. The Decisions Below Did No More Than Apply The Principles of *New Hampshire v. Maine*

In *New Hampshire*, this Court, observing that the circumstances for applying judicial estoppel "'are probably not reducible to any general formulation of principle,'" 532 U.S. at 750 (internal citations omitted), nevertheless identified three factors that "typically inform" whether to invoke judicial estoppel:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later pro-

> ceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (internal citations omitted).

The district court's opinion in this case faithfully adhered to these principles, first setting forth the *New Hampshire* factors and then applying them to the facts of this case based on a detailed review of the evidence. *See* Pet. App. 14-16. Exercising its considerable discretion, the district court declined to find judicial estoppel, because: (1) Exxon's position that it did not agree to pay compound prejudgment interest if state law applied was not inconsistent with its prior position that interest would be compounded if federal law was deemed to apply; (2) there could be no perception the court had been misled since the court had never adopted the view that Exxon "had agreed to pay compound interest even if state law applied"; and (3) there was no unfair advantage because the parties received the opportunity to brief and argue the issue of whether there was an agreement to compound interest. Pet. App. 15-16. The Ninth Circuit affirmed, holding that the district court's refusal to invoke judicial estoppel was not an abuse of discretion. Pet. App. 2-3.

Petitioner does not suggest, much less demonstrate, that either the district court or the Ninth Circuit misstated the law that applies to judicial estoppel. Indeed, Petitioner's statement of the law of judicial estoppel, Pet. 9-10, is virtually identical to the district court's statement of that same law, Pet. App. 14-15. Petitioner's quarrel with the courts below is plainly not a disagreement over the lower courts' statement of the law; it is rather with their application of that correctly-stated law to the particular facts of this case. Thus, Petitioner restates its factual arguments why judicial estoppel should be applied, Pet. 17-18, and contends that the Ninth Circuit's decision was "not a proper application of this Court's holding in *New Hampshire*," Pet. 18. Even assuming *arguendo* that those arguments had merit (which they do not), neither of them presents a suitable ground for granting review. It is well established that this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented primarily "a question of fact, which does not merit Court review"). Similarly, the assertion that a lower court misapplied a properly stated rule of law rarely provides a basis for granting certiorari, and should not do so here. *See* Sup. Ct. R. 10; Eugene Gressman et al., *Supreme Court Practice* 276 (9th ed. 2007) (this Court does not "review and correct every misstep made by the lower courts in the application of accepted principles").

In short, nothing in the factbound rulings by the district court and the Ninth Circuit "so far departed from the accepted and usual course of judicial proceedings" so as to justify this Court's review. Sup. Ct. R. 10. To the contrary, as explained above, both decisions were perfectly consistent with the principles for applying judicial estoppel laid down in *New Hampshire*.

B. Petitioner Has Not Demonstrated Any Conflict In The Circuits

Petitioner also contends that the Court should review the Ninth Circuit's judgment because there are inter-circuit conflicts concerning whether judicial estoppel can be applied when the court did not "accept" a party's prior position, or in the absence of a finding that the court was misled. Pet. 10-16. Petitioner presents these points as if they were two independent subjects, but it is hard to see logically how this can be so. If the court to which a party's first position was presented did not accept it, there cannot be a "perception" that the court was misled. "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations." *New Hampshire*, 532 U.S. at 750-51. Conversely, it is hard to see how a court that was not "misled" would accept a party's prior position that is inconsistent with the true facts.

What is in fact under discussion in the circuit court cases cited by Petitioner is the extent to which the second prong of *New Hampshire*'s "flexible" and "non-exhaustive" test for judicial estoppel is a mandatory prerequisite for a finding of judicial estoppel. All circuit courts uniformly follow *New Hampshire*'s

holding that courts deciding whether to apply judicial estoppel should *consider* whether a court accepted the party's prior position and was misled. Some courts emphasize this factor more than others, and may even decline to find a judicial estoppel absent a tribunal's adoption of a party's prior position.[3] Other courts weigh "judicial acceptance" along with the two other *New Hampshire* factors in considering whether to invoke judicial estoppel.[4] Both approaches, however, are consistent with the flexible application of judicial estoppel principles endorsed by this Court. *See New Hampshire*, 532 U.S. at 751 ("In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel."). At most, the differences among the lower courts in applying the second prong of *New Hampshire* are attributable only to "different verbal formulations of the same underlying legal rule," which, as Justice Breyer has explained, are not "actual divides among

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[3] *See SBT Holdings, LLC v. Town of Westminster*, 547 F.3d 28, 37 (1st Cir. 2008); *Stichting Ter Behartging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 45 (2d Cir. 2005); *United States v. Pelullo*, 399 F.3d 197, 223 (3d Cir. 2005); *1000 Friends of Md. v. Browner*, 265 F.3d 216, 226-27 (4th Cir. 2001); *Peoples State Bank v. GE Capital Corp. (In re Ark-La-Tex Timber Co.)*, 482 F.3d 319, 333 (5th Cir. 2007); *Pennycuff v. Fentress County Bd. of Educ.*, 404 F.3d 447, 453 (6th Cir. 2005); *Duthie v. Matria Healthcare, Inc.*, 540 F.3d 533, 542 (7th Cir. 2008).

[4] *See Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006); *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780-81 (9th Cir. 2009); *Bradford v. Wiggins*, 516 F.3d 1189, 1195 (10th Cir. 2008); *Stephens v. Tolbert*, 471 F.3d 1173, 1177-78 (11th Cir. 2006).

the lower courts" but merely "minor linguistic discrepancies" that "are not outcome determinative." Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006).

Contrary to Petitioner's assertions, Pet. 10-13, the circuit courts have not reached conflicting results based on their different formulations of the weight to be given *New Hampshire*'s second prong.[5] Petitioner cites only to dicta. But dicta do not create a circuit conflict in the absence of conflicting *results*. *See* Gressman et al., *supra*, at 241 (To justify certiorari, "there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized.").

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[5] Nor has this purported conflict been "widely recognized." *Id.* at 13. The "conflict" discussed in *Transamerica Leasing, Inc. v. Institute of London Underwriters*, 430 F.3d 1326 (11th Cir. 2005), concerned the narrow question of "whether judicial estoppel should apply when the prior position resulted in a settlement, and not in the court actually adopting a position." *Id.* at 1336 n.8. Notably, three of the five cases cited in *Transamerica* on this point precede the *New Hampshire* decision, and therefore could not have staked out conflicting positions on this Court's instructions regarding "judicial acceptance." *See id.* In addition, the authorities presenting the narrow conflict over whether settlements qualify for judicial estoppel are inapplicable to the facts of this case. Here, the parties did not settle the issue of prejudgment interest; they submitted it to the district court for resolution. *See* Pet. App. 73-74. Similarly, the First Circuit, in *Thore v. Howe*, 466 F.3d 173 (1st Cir. 2006), did not identify "a split on this issue between the First and Third Circuits." Pet. 13. It merely noted that while the First Circuit had recognized certain criteria for the application of judicial estoppel, the Third Circuit had articulated certain others, none of which were conflicting. *See Thore*, 466 F.3d at 182 n.2.

None of the cases Petitioner cites finds a judicial estoppel when the prior inconsistent statement was not accepted by the prior court, or where the prior court was not misled; similarly, none of Petitioner's cases refuses to find a judicial estoppel when the first and third prongs of *New Hampshire* are met but not the second.[6] The *results* of the decided cases are thus not in conflict, even if some language in some cases might suggest a conflict may arise in some future case.

Whatever the divergence in dicta in the circuit courts, moreover, none of the issues under discussion is presented by the facts of this case. Whether judicial acceptance of the party's prior position or the perception that a court was misled should be an absolute prerequisite for judicial estoppel or whether it should be merely one factor among others to be taken into account, the answer would make no difference here. Petitioner does not even suggest that it would. Rather, in this case, the district court looked at all the *New Hampshire* factors, and concluded that *none* of them was present here. It does

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[6] Petitioner's treatment of the cases is sloppy. Thus, Petitioner says that some courts have allowed litigants to assert inconsistent positions, "so long as no one is misled." Pet. 16 & n.7. But three of the four decisions Petitioner relies on each expressly found that the parties had *not* asserted inconsistent positions. *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005); *Ameritox, Ltd. v. Aegis Corp.*, No. 07-80498, 2008 WL 4540063, at *3 (S.D. Fla. Oct 10, 2008); *In re Oneida Ltd.*, 383 B.R. 29, 45-46 (Bankr. S.D.N.Y. 2008), *rev'd and remanded on other grounds*, 562 F.3d 154 (2d Cir. 2009). (The fourth decision in fact found a judicial estoppel, and thus did not allow the plaintiff to assert inconsistent positions. *See Thore*, 466 F.3d at 181-85, 187.)

not matter to that determination in any way whether the second prong is an absolute prerequisite to a judicial estoppel or just one factor among many. Whatever the legal significance of the second prong in some other case, the district court found that that prong was not met here. Therefore the district court's decision would not be changed in any way by this Court's resolution of the issues Petitioner asks the Court to review.[7] There is accordingly no reason to grant certiorari. *See* Gressman et al., *supra*, at 504 (case "presents a poor vehicle for resolving a conflict" where case "would be decided in favor of the respondent no matter how the conflict were resolved").

Similarly, no circuit conflict is implicated by the Ninth Circuit's observation that "the [district] court was not misled." Pet. 18. That was not a ruling that judicial estoppel could never apply unless a court was misled, as Petitioner wrongly suggests. *Id.* The court of appeals neither reached nor decided that question. Its language reflected at most a holding that a district court that (1) did not understand a litigant's statements to be inconsistent with one another; and (2) was not misled could, without abuse of discretion, refuse to find a judicial estoppel.

In *New Hampshire*, this Court ruled that in evaluating whether to find a judicial estoppel, the

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[7] That is, if the Court were to hold that the second prong were a necessary prerequisite for judicial estoppel, there would be no judicial estoppel here because the district court has already held that factor is not met. Conversely, if the Court were to hold that the second prong was only one consideration among many (as the district court supposed), the district court would make the same analysis as before, and the outcome would be the same.

lower courts should, inter alia, "inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" 532 U.S. at 750. That is exactly what the district court and the Ninth Circuit did here. Applying those principles to the facts of this case, they found that application of judicial estoppel was unwarranted. They decided nothing broader than that, nothing that put them in conflict with any other circuit, and certainly nothing that would call for an exercise of this Court's certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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In The
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SEA HAWK SEAFOODS, INC.,

Petitioner,

v.

EXXON MOBIL CORPORATION AND
EXXON SHIPPING COMPANY,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

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INTRODUCTION

Exxon erroneously argues that this Court should not grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit because Sea Hawk "has not demonstrated any conflict in the circuits." Opp. 14. That assertion cannot be squared with applicable case law. Summarizing the current state of the law, a leading treatise regarding civil procedure notes that there is a "lack of any uniform approach among the federal courts." 18B Charles Alan Wright et al. *Federal Practice and Procedure* § 4477, at 550 (3d ed. 2002). As set forth in Section I below, the inter- and intra-circuit conflicts regarding the requirements for establishing judicial estoppel are both clear and well entrenched, thus meriting this Court's review.

Exxon also argues that the decisions below correctly apply this Court's "flexible" analysis regarding judicial estoppel as set forth in *New Hampshire v. Maine*, 532 U.S. 742 (2001). Opp. 11-14. While Sea Hawk agrees with Exxon that the Court does not review factual disputes, Exxon clearly and repeatedly stated, *in writing and without qualification*, that it agreed to pay Sea Hawk compound interest. It did so for strategic reasons, hoping that it would be rewarded with a lower interest rate under federal law. As set forth in Section II below, the decisions below are erroneous in numerous respects. The *legal* issues presented by those decisions, as well as by Exxon's gamesmanship, clearly merit this Court's review.

ARGUMENT

I. THERE ARE WELL-ESTABLISHED AND DEEPLY ENTRENCHED CONFLICTS REGARDING JUDICIAL ESTOPPEL PRINCIPLES.

As Sea Hawk's Petition demonstrates, lower courts are deeply divided over the proper application of this Court's holding in *New Hampshire*. Pet. 10-16. A number of courts have expressly recognized a split – both inter-circuit and intra-circuit – regarding whether a court must accept or endorse a previous inconsistent statement in order to apply judicial estoppel. As the Eleventh Circuit explained, "[t]his issue has divided the Courts." *Transamerica Leasing Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1336 n.8 (2005). Other courts agree. *See, e.g., Thore v. Howe*, 466 F.3d 173, 182 n.2 (1st Cir. 2006) (noting that "[o]ther circuits have articulated other criteria"); *Lizotte v. Praxair, Inc.*, __ F. Supp. 2d __, No. C07-1868RSL, 2009 WL 564920, at *3 (W.D. Wash. Mar. 3, 2009) (discussing "minority" and "majority" view in circuits as to whether judicial estoppel "applies even if the litigant was unsuccessful in asserting the inconsistent position"). These cases show not only that a split exists, but that the split is widely recognized by lower courts.

In addition to quoting several authorities that have expressly recognized that a split exists among the circuits, Sea Hawk's Petition discusses several opinions showing how different circuits applying the Court's holding in *New Hampshire* have reached

conflicting results. Pet. 11-13. Sea Hawk explained, for example, that the Second Circuit has rejected a judicial estoppel argument on the sole basis that the district court had not accepted the party's previous position whereas the Third Circuit has concluded that judicial estoppel "does not turn" on that consideration. Pet. 12-13 (*citing Stichting v. Shreiber*, 407 F.3d 34, 45 (2d Cir. 2005); *Krystall Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors*, 337 F.3d 314, 324 (3d Cir. 2003)). These opinions, both claiming to follow *New Hampshire*, are in direct conflict.

Exxon does not discuss or dispute the clear conflict between *Krystall* and *Stichting*. Instead, Exxon makes the odd assertion that the recognition of a circuit split in *Transamerica Leasing* and *Thore* is "dicta." Opp. 16. If by "dicta" Exxon means that neither the Second Circuit in *Stichting* nor the Third Circuit in *Krystall* squarely *held* that a split exists, the argument makes no sense. Whether "dicta" or "holding," it is clear that both courts and scholars have expressly recognized that a split exists among the circuits regarding the proper application of *New Hampshire*. This conflict is now firmly entrenched, as it has been eight years since the Court decided *New Hampshire*. Under these circumstances, this Court's review is both necessary and appropriate.

Exxon next attempts to minimize the existence of a circuit split by claiming that the Court's holding in *New Hampshire* is "flexible." Opp. 15 (internal quotation marks and citations omitted). But no rule can be so flexible as to allow two different courts to reach

contrary results on the same facts. If a factual assertion in a settlement agreement can never satisfy the requirements for judicial estoppel in one court (*see, e.g., In re Bankvest Capital Corp.*, 375 F.3d 51, 60 (1st Cir. 2004)), then another court's decision to allow judicial estoppel based on a settlement agreement (*see, e.g., Commonwealth Ins. Co. v. Titan Tire, Corp.*, 398 F.3d 879, 887 (7th Cir. 2004)) cannot be a "flexible" application of the same rule. Nor can this be "different verbal formulations of the same legal rule," as Exxon also claims. Opp. 15.

Not only do inter-circuit conflicts exist on these issues, but intra-circuit conflicts exist as well. Pet. 14 n.5. In *Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1049 (9th Cir. 2004), for example, the plaintiff – like Exxon here – attempted to avoid judicial estoppel by seeking to qualify its prior statement that it was not bringing a "chargeability claim." The Ninth Circuit held that "[t]his change in position is precisely the kind of 'playing fast and loose with the courts' that judicial estoppel is designed to prevent." *Id.* at 1050. This case presents the same basic facts – Exxon is attempting to qualify its prior representation regarding compound interest to avoid judicial estoppel – yet the Ninth Circuit held that judicial estoppel did not apply here *only* because the district court "was not misled." Pet. App. 3. As Sea Hawk explained (Pet. 14 n.5), such intra-circuit conflicts exist in at least the Seventh and Ninth Circuits.

Nor can these results be explained by the Court's holding in *New Hampshire* that lower courts should

not create "inflexible prerequisites for determining the applicability of judicial estoppel." Opp. 15; *New Hampshire*, 532 U.S. at 751. A court that dismisses a judicial estoppel claim based solely on the lack of judicial acceptance (as in *Stichting*) or solely because "the trial court was not misled" (Pet. App. 3) has in fact created an inflexible prerequisite. The fact that Exxon is able to identify numerous appellate courts that, like the Ninth Circuit here, "emphasize" one factor over the others (Opp. 15 n.3) underscores the need for this Court to again provide guidance on the appropriate scope of judicial estoppel. *See* Eugene Gressman et al., *Supreme Court Practice* 253 (9th ed. 2007) (certiorari granted "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification").

Finally, contrary to Exxon's assertion (in its question presented) that a district court's ruling regarding judicial estoppel principles is reviewed for abuse of discretion, lower courts have split on that issue as well. In *Lorillard Tobacco Co. v. Chester, Willcox & Sabee*, 546 F.3d 752, 757 (6th Cir. 2008), the Sixth Circuit held that "this Court has continued to adhere to the *de novo* standard after *New Hampshire*." Other courts, in contrast, have reviewed such decisions for "abuse of discretion." *Wagner*, 354 F.3d at 1050. In *Leonard v. Southwestern Bell Corp. Disability Income Plan*, 341 F.3d 696 (8th Cir. 2003), the Eighth Circuit explained that "[t]his circuit has not clearly stated whether we review a district court's decision on the applicability of the collateral or judicial estoppel

doctrines under an abuse of discretion or de novo standard of review. *Other courts that considered this issue reached conflicting opinions.*" *Id.* at 700 (emphasis added). For this reason too, the Court should grant this Petition.

II. THIS MATTER RAISES IMPORTANT LEGAL ISSUES THAT MERIT THIS COURT'S REVIEW.

Exxon argues repeatedly that the issues presented by Sea Hawk's Petition are "factbound." Opp. 11, 14. That is incorrect. Sea Hawk asked the district court to interpret the parties' agreement as a matter of law. That agreement, drafted by Charles Diamond as counsel for Exxon and signed by both parties, states without qualification that "[t]he parties also agreed that prejudgment interest will be compounded annually." Pet. App. 51. This document is included in the Appendix to Sea Hawk's Petition. *Id.* The Court can review the document and decide for itself what is meant by the unqualified statement that "prejudgment interest will be compounded."

The same is true with regard to Exxon's other statements. Exxon repeatedly confirmed, in briefs and at oral argument, that the parties had agreed to compound interest. It informed the Ninth Circuit that "interest is to be *compounded*" and argued that federal law should govern the applicable interest rate "because the stipulation provides for interest to be compounded." Pet. App. 54 n.9, 58. And it informed

the district court that "Exxon voluntarily agreed to compound interest and factored that in to the computation of what it agreed to tender Sea Hawk." Pet. App. 71 n.16. Here, too, the Court can review each of the statements and determine its meaning.

Addressing that issue, Exxon's assertion that its agreement to pay compound interest was "limited to federal law" (Opp. 10) makes no sense, both legally and factually. Exxon did not qualify *any* of its statements regarding compound interest. And contrary to Exxon's argument that Judge Graber did not address the judicial estoppel issue (Opp. 10), she recognized, as the undisputed record shows, that Exxon's agreement to pay compound interest cannot properly be limited to federal law:

- *First*, Judge Graber correctly noted that Exxon's agreement to pay compound interest "makes the most sense when applied to Alaska law, which requires an agreement to support compounding of interest." Pet. App. 3. In contrast, if federal law applied, Exxon's statements regarding compound interest were superfluous because compound interest is statutorily required by 28 U.S.C. § 1961(b) *regardless* of a separate agreement.

- *Second*, Judge Graber recognized that Exxon had agreed to pay compound interest "without qualification." Pet. App. 3. She added: "Because the question whether state or federal law supplied the rate was being litigated actively, and had been reserved for appeal, the lack of qualification is significant." *Id.*

This, too, has a direct bearing on judicial estoppel.

- *Third*, Judge Graber added that "under Alaska law, a contractual ambiguity is construed against the drafter." *Id.* Each statement regarding prejudgment interest was written or uttered by Exxon's counsel. To the extent any such statement is "equivocal," as Exxon claims (Opp. 2), it should be construed against Exxon.

Thus, while it is true that Judge Graber's dissent does not mention the words "judicial estoppel," her analysis applies equally to that doctrine.

With that background, it is clear that the question presented by Sea Hawk's Petition is outcome determinative and that Exxon's contrary assertion – that "the answer would make no difference here" (Opp. 17) – is incorrect. That question asks whether judicial estoppel requires (a) that a litigant's previous position was adopted or accepted by the court in which it was advanced, or (b) that a court was misled by the litigant's prior position. The record shows that the district court initially accepted Exxon's representation that interest would be compounded. In an April 12, 2005, order, the district court stated: "Sea Hawk raised the issue of whether prejudgment interest should be compounded annually. Exxon states that it has voluntarily agreed to compound the interest annually." Pet. App. 30 n.8. The same order also states: "The parties have agreed that prejudgment interest will be compounded annually; so, the motion is

granted as to that issue." Pet. App. 46. If such acceptance is sufficient to establish judicial estoppel, as Sea Hawk believes it should be, then Sea Hawk ought to prevail on this basis alone.

It was not until after the Ninth Circuit concluded that the interest rate should be determined by state law that Exxon reversed course and asserted – for the first time – that its agreement to pay compound interest was limited to federal law. By then, judicial estoppel already applied and Exxon was estopped from contradicting its prior statement. As Justice Scalia noted at oral argument in *New Hampshire*, "If you believed it was arbitrary, you shouldn't have signed this [it] seems to me, and I think we can hold you to what you sign." Oral Argument, *New Hampshire v. Maine*, 2001 WL 417672, at *37 (U.S. Apr. 16, 2001) (No. 130). The same reasoning is equally applicable here.

The lower courts did not so hold. Notwithstanding its own prior ruling that "[t]he parties have agreed that prejudgment interest will be compounded annually; so, the motion is granted as to that issue" (Pet. App. 46), the district court ruled in favor of Exxon and held that interest should be simple, stating that "it was the court's perception that Exxon's position was that prejudgment interest would be compounded if federal law applied." Pet. App. 15. The Ninth Circuit affirmed only because it believed – presumably based on the district court's post-hoc "perception" – that the district court "was not misled." Pet. App. 3.

These rulings do not withstand serious scrutiny, since (a) Exxon never qualified its numerous statements that the parties had agreed to compound interest, and (b) the district court accepted those statements and ruled that "the motion is granted as to that issue." Pet. App. 46. But none of these machinations is determinative here if, as Sea Hawk contends, judicial estoppel was triggered when the district court first accepted Exxon's position. The fact that the district court later claimed that it was not misled shows only that Exxon was successful in playing fast and loose with the court. Thus, contrary to Exxon's argument, the question presented here – which centers on whether the court was misled and whether a litigant's position was accepted – clearly makes a difference. Depending on how the Court resolves these issues, Sea Hawk may or may not prevail on its judicial estoppel argument.

Finally, even if this case were "factbound," as Exxon claims (Opp. 11, 14), that does not mean that Sea Hawk's Petition should be denied. Sea Hawk specifically represented in its Petition that Exxon made the statements at issue here to persuade the lower courts to calculate prejudgment interest in accordance with the lower interest rate dictated by federal law rather than the higher rate required by Alaska law. Exxon does not dispute that assertion. Whether the district court was or was not misled, and whether it accepted Exxon's position or not, this is precisely the sort of gamesmanship that undermines the efficacy of our judicial system, leads to unjust

results, increases the cost associated with litigation, and generates cynicism regarding the legal process. Thus, factbound or not, this case presents an invaluable opportunity to provide additional guidance regarding the circumstances in which courts hold litigants to their statements.

CONCLUSION

For the foregoing reasons, and as set forth in Sea Hawk's Petition, this Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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